SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

In the Matter of the Application of

DONALD J. TRUMP, DONALD TRUMP, JR., ERIC TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, 401 NORTH WABASH VENTURE LLC, TRUMP OLD POST OFFICE LLC, 40 WALL STREET LLC, and SEVEN SPRINGS LLC,

Petitioners,

For a Judgment Under Article 78 of the C.P.L.R.

v.

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.

No. 2023-05859

Supreme Court
New York County
Index No. 452564/2022

AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

Cleland B. Welton II, an attorney duly admitted to practice law in the State of New York, affirms upon penalty of perjury:

1. I am an Assistant Solicitor General in the Office of the Attorney General of the State of New York (OAG), the plaintiff in the Executive Law § 63(12) enforcement action from which this C.P.L.R. article 78 proceeding arose. I make this affirmation in opposition to petitioners' motion for leave to appeal to the Court of

Appeals from this Court's November 30, 2023 decision denying petitioners' motion for a stay of enforcement of two orders of Supreme Court pending disposition of the article 78 proceeding. Together, the challenged orders placed exceedingly narrow limits on comments that the parties and their counsel can make about Supreme Court's staff during the ongoing trial in the enforcement action.

2. This Court should deny the motion for leave to appeal. The Court's interlocutory and discretionary denial of petitioners' stay motion, based on a case-specific assessment of the equities and circumstances here, does not present any novel legal question—let alone a legal question of statewide importance. In any event, this Court properly exercised its broad decision to deny a stay. The Court was entitled to conclude that the public interest in protecting the safety of Supreme Court's staff and the integrity of trial proceedings far outweighed petitioners' minimal interest in levying personal attacks against the court's staff during trial. And the Court acted well within its discretion in preliminarily assessing that petitioners are unlikely to succeed on the merits of the underlying article 78 proceeding.

BACKGROUND

3. Petitioners filed this article 78 proceeding in this Court on November 15, 2023, seeking a writ of prohibition against enforcement of orders that Supreme Court (Engoron, J.) issued in the underlying Executive Law § 63(12) action on October 3 and November 3, 2023.[1] (NYSCEF Doc. No. 1.) The October 3 and

[1] The underlying article 78 proceeding also challenged orders that Supreme Court issued on October 20 and 26, which each imposed a monetary sanction on Mr.

November 3 orders placed exceedingly narrow restrictions on the speech of the parties and their counsel, respectively, in response to extraordinary and dangerous personal attacks that petitioner Donald J. Trump and petitioners' counsel made against the court's staff during trial.

4. On November 16, 2023, petitioners sought a stay of enforcement of the October 3 and November 3 orders pending disposition of the article 78 proceeding. (NYSCEF Doc. No. 4.) A single justice of this Court granted an interim stay that same day pending adjudication of petitioners' motion for a stay. (NYSCEF Doc. No. 7.) On November 30, a four-justice panel unanimously denied petitioners' stay motion and vacated the interim stay. (NYSCEF Doc. No. 18.)

5. On December 4, 2023, petitioners filed an application for "expedited leave to appeal" to the Court of Appeals from this Court's November 30 order declining to stay enforcement of Supreme Court's October 3 and November 3 orders pending adjudication of the underlying article 78 proceeding. (*See* Mem. at 1, NYSCEF Doc. No. 19.) Oppositions and answers to the article 78 petition were filed on December 6. (NYSCEF Doc. Nos. 21, 23.)

6. Given that the Court recently denied petitioners' stay motion and has familiarity with the record and prior filings, OAG respectfully relies upon the full recitation of the facts and procedural history set forth in the affirmations in

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Trump for engaging in frivolous conduct that violated the October 3 order. (*See* Affirm. of Dennis Fan in Opp'n to Mot. for Stay ¶¶ 13-19, NYSCEF Doc. No. 8.) The October 20 and 26 orders are not at issue here because petitioners do not seek leave to appeal from the denial of their stay motion as to those two orders.

opposition to petitioners' motion for a stay submitted by OAG (Fan Affirm. in Opp'n to Stay ¶¶ 6-39, NYSCEF Doc. No. 8) and the Office of Court Administration (Affirm. of Lisa Evans in Opp'n ¶¶ 2-3, 5, NYSCEF Doc. No. 9), and to respondents' papers in opposition to the article 78 petition. (NYSCEF Doc. Nos. 21, 23.)

7. OAG further respectfully refers the Court to the affirmation of Charles Hollon, which documents the hundreds of threatening, harassing, and antisemitic messages that Supreme Court and its staff have received as an evident result of the personal attacks that triggered the orders from which this proceeding arose. (Evans Affirm., Ex. E, Hollon Affirm., NYSCEF Doc. No. 9.) Mr. Hollon, an Officer-Captain in the Department of Public Safety's Judicial Threats Assessment Unit, attested that such messages reflect an "ongoing security risk for the judge, his staff and his family" (*id.* ¶ 10), and that the implementation of Supreme Court's orders led to a decrease in the number of threatening messages that the court and its staff received (*id.* ¶ 11).

8. In their emergency application for leave to appeal, petitioners also requested expedited determination of the underlying article 78 proceeding. (*Id.*) The Court calendared the petition for submission on December 12, 2023.

REASONS FOR DENYING LEAVE TO APPEAL

A. This Court's Discretionary Determination to Deny Petitioners' Stay Motion Presents No Leave-Worthy Question of Law

9. The Court should deny the motion because this Court's interlocutory and discretionary order declining to issue a stay pending adjudication of the article 78 petition does not present any leave-worthy question.[2] *See* N.Y. Const. art. VI, § 3(a); C.P.L.R. 5501(b). The Court's order does not conflict with any decision of the Court of Appeals or of any other Appellate Division, and does not present any novel legal issue of public importance warranting further review. *See* Rules of Ct. of Appeals (22 N.Y.C.R.R.) § 500.22(b)(4).

10. This Court's determination not to stay Supreme Court's orders during the short time needed to adjudicate the article 78 proceeding is a highly discretionary and circumstance-specific determination. The Court's case-specific determination entailed a discretionary balancing of the relative hardships by weighing petitioners' claims of injury against the risk that granting a stay under the facts presented would prejudice the public interest. *See Da Silva v. Musso*, 76 N.Y.2d 436, 443 n.4 (1990); *DeLury v. City of New York*, 48 A.D.2d 405, 405 (1st Dep't 1975); Mark Davies et al., *Civil Appellate Practice* § 9:4 (New York Practice Series vol. 8, 3d ed. May 2023 update) (Westlaw). It also involved a discretionary and preliminary assessment of

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[2] Petitioners disregard this Court's requirement that a leave motion "set forth the questions of law sought to be reviewed by the Court of Appeals." Rules of App. Div. (22 N.Y.C.R.R.) § 1250.16(d)(3)(i). This alone is a sufficient basis to deny leave because petitioners' failure to specify a question for review leaves this Court no sound basis to conclude that a leave-worthy question exists.

petitioners' likelihood of success in obtaining a writ of prohibition. *See Rand v. Rand*, 201 A.D.2d 403, 403 (1st Dep't 1994). Moreover, prohibition is itself an extraordinary remedy left to the Court's discretion. *See Matter of Neal v. White*, 46 A.D.3d 156, 159 (1st Dep't 2007). This Court's exercise of discretion to deny a stay pendente lite here does not present any novel legal issue, let alone one of statewide importance.

11. Contrary to petitioners' suggestion (Petitioners' Mem. of Law in Supp. of Emergency Appl. for Leave to Appeal (Mem.) at 12), publicity surrounding the trial in the enforcement proceeding against petitioners does not transform the Court's discretionary stay denial in this collateral article 78 proceeding into a significant legal question. Indeed, the Court of Appeals has denied leave to appeal in prior cases involving Mr. Trump or his businesses, though Mr. Trump has drawn public attention for decades. *See, e.g.*, *Jacobus v. Trump*, 31 N.Y.3d 903 (2018); *Trump v. Cheng*, 13 N.Y.3d 833 (2009); *Trump v. Trump*, 80 N.Y.2d 760 (1992).

12. Petitioners also err in arguing that the denial of their stay motion warrants the Court of Appeals' review because Supreme Court's orders supposedly violate their First Amendment rights. *See* Mem. at 12-15. This Court's stay denial did not resolve (or say anything) about that constitutional issue. Rather, the Court made a discretionary determination that petitioners are not so likely to obtain a writ of prohibition as to tip the equities of the stay motion in their favor. An appeal from this Court's stay denial therefore would not bring up for review the constitutional questions on which the leave motion is premised.

13. Petitioners incorrectly contend (Mem. at 10, 15) that they should be granted leave to appeal the stay denial on the theory that the final judgment in this article 78 proceeding will be appealable as of right under C.P.L.R. 5601(b)(1). For one thing, the fact that a final decision will issue soon—the Court has calendared the article 78 proceeding for submission on December 12—undermines petitioners' leave motion: That final decision will moot the question whether a stay should have issued pending determination of the article 78 proceeding,[3] and will thus also moot the current leave motion. In any event, the question that may be presented when the article 78 proceeding is finally adjudicated (i.e., whether petitioners can demonstrate a clear legal right to an extraordinary writ of prohibition) is distinct from the question presented by the stay denial (i.e., whether this Court providently exercised its discretion in denying the stay). And petitioners are wrong to suggest that the Court of Appeals will necessarily have as-of-right jurisdiction to review the final judgment, because such jurisdiction lies under C.P.L.R. 5601(b)(1) only if the judgment directly presents a *substantial* constitutional question. Arthur Karger, *Powers of the New York Court of Appeals* § 7:5 (3d ed. Sept. 2023 update) (Westlaw).

[3] Petitioners requested only a stay "pending the resolution of this [article 78] proceeding," and have not sought any further stay. (*See* Proposed Order to Show Cause at 2, NYSCEF Doc. No. 4 (requesting stay).)

B. This Court Properly Exercised Its Discretion to Deny a Stay.

14. Leave to appeal is also unwarranted because this Court properly exercised its broad discretion in denying petitioners' stay motion. OAG incorporates its prior, detailed explanation of why a stay would have been inappropriate (Fan Affirm. in Opp'n to Stay ¶¶ 31-80, NYSCEF Doc. No. 8; *accord* Affirm. of Dennis Fan in Opp'n to Pet. ¶¶ 33-86, NYSCEF Doc. No. 23), and presents the following brief response to petitioners' arguments here.

15. *First*, this Court properly exercised its discretion in determining that the public interest and balance of the equities warranted denial of the stay motion. At the outset, petitioners' own delay in filing this article 78 proceeding fatally undermines their contention that they would suffer immediate and irreparable injury absent a stay. They did not file their article 78 proceeding until November 14, nearly six weeks after Supreme Court's October 3 order and nearly two weeks after the November 3 order. This unexplained delay is alone sufficient to support the stay denial.

16. In any case, petitioners' asserted free-speech injuries are insubstantial in light of the narrow scope of the challenged orders. Those orders do not prevent petitioners or their counsel from criticizing Supreme Court, the presiding justice, the plaintiff, the witnesses, or the substance of the proceedings. (*See* Fan Affirm. in Opp'n to Stay ¶¶ 47, 62, NYSCEF Doc. No. 8.) Nor have the orders prevented petitioners from preserving their objections for purposes of litigation. (*See id.* ¶¶ 24, 58.) The

orders simply prevent the parties and their attorneys from engaging in baseless, personal, and harassing attacks on Supreme Court's staff.

17. This Court was entitled to conclude that any slight burden upon petitioners' speech rights is vastly outweighed by Supreme Court's prerogative to protect the safety of its staff and the integrity and decorum of its proceedings, particularly in the "overheated" environment in which the trial is taking place. (*See id.* ¶¶ 44-46, 61.) As Supreme Court made clear, it has been "inundated with hundreds of harassing and threat[en]ing phone calls, voicemails, emails, letters, and packages." (Pet., Ex. J, Nov. 3 Order at 2, NYSCEF Doc. No. 1.) And the public-safety department of the court further explained that the number of threats increased each time Mr. Trump made personal attacks on the court's staff (*see* Evans Affirm., Ex. E, Hollon Affirm. ¶ 8, NYSCEF Doc. No. 9), and that it considered such threats "serious and credible and not hypothetical or speculative" (*id.* ¶¶ 5, 11).

18. *Second*, leave is also not warranted because this Court properly determined that, on the particular facts of this case, petitioners are unlikely to prevail on the merits of the article 78 proceeding—a preliminary determination that does not definitively resolve any legal issue in the case, let alone an issue of statewide importance. Indeed, petitioners have not refuted OAG's explanations that article 78 relief is unavailable because petitioners could have obtained appellate review of Supreme Court's October 3 and November 3 orders by filing a motion to vacate those orders and taking an appeal if that motion was denied. (*See* Fan Affirm. in Opp'n to

Stay ¶¶ 33-34, NYSCEF Doc. No. 8; Fan Affirm. in Opp'n to Pet. ¶¶ 34-36, NYSCEF Doc. No. 23.)

19. In any event, Supreme Court's orders comport with the First Amendment of the U.S. Constitution and with Article I, Section 8 of the New York Constitution. It is well-settled that the right to freedom of speech "must not be allowed to divert [a] 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 v. Maxwell*, 384 U.S. 333, 350-51 (1966) (alteration and quotation marks omitted). Courts thus have wide latitude to "restrict the free expression of participants [in litigation], including counsel, witnesses, and jurors." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104 n.21 (1981); *see, e.g.*, *Matter of National Broadcasting Co. v. Cooperman*, 116 A.D.2d 287, 292-93 (2d Dep't 1986). And the free-speech rights of attorneys inside the courtroom are especially limited. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1072-73 (1991). The Court properly applied these established principles to the facts here in determining that the challenged orders likely do not violate petitioners' free-speech rights—and do not do so with such clarity as to justify a writ of prohibition.

20. Supreme Court's October 3 order properly prohibited the parties from making public statements about court staff to protect their safety and the integrity of the trial. (*See* Pet., Ex. F, Oct. 3 Tr. at 270, NYSCEF Doc. No. 1.) That order became necessary only after the court learned that Trump had made "a disparaging, untrue and personally identifying [social-media] post about a member of [the court's] staff,"

which was not only posted online but was also emailed to millions of recipients. (*Id.*; *see id.*, Oct. 20 Tr. at 2023.) Supreme Court reasonably determined that such posts put its staff at risk of harassment and harm, creating a "'reasonable likelihood' of a serious and imminent threat to the administration of justice," *Cooperman*, 116 A.D.2d at 292. (*See* Evans Affirm., Ex. E, Hollon Affirm. ¶ 10, NYSCEF Doc. No. 9 (describing "ongoing security risk" for judge and his staff and family).)

21. As the D.C. Circuit recently explained in upholding the bulk of the gag order issued against Mr. Trump in one of his federal criminal proceedings, Mr. Trump's personally identifying and disparaging attacks on others have frequently led to significant threats and harassment against the targets of his attacks. *United States v. Trump*, No. 23-3190, 2023 WL 8517991, at *13-15 (D.C. Cir. Dec. 8, 2023) (collecting examples). And that pattern of attacks on court staff in the underlying trial here and in other similar cases "poses a significant and imminent threat to the fair and orderly adjudication" of the litigation in which he is involved. *Id.* at *13. "Just as a court is duty-bound to prevent a trial from devolving into a carnival, so too can it prevent trial participants and staff from having to operate under siege." *Id.* at *16 (citation omitted).

22. Contrary to petitioners' assertions (Mem. at 2, 5, 12-13), the October 3 order is not overbroad and does not cover "core political speech."[4] Rather, the *only*

[4] No authority supports' petitioners' suggestions (Mem. at 2, 12-13) that Mr. Trump's choice to run for President grants him constitutional leeway to attack court employees that other litigants lack. To the contrary, the D.C. Circuit has rejected this precise argument. *Trump*, 2023 WL 8517991, at *18.

topic that order covers is comments about members of Supreme Court's staff. Courts have frequently upheld gag orders that are substantially broader. (*See* Fan Affirm. in Opp'n to Stay ¶ 22, NYSCEF Doc. No. 8.) Petitioners miss the mark in noting that the October 3 order prohibits the parties from making purportedly "innocuous or relevant" comments about the court's staff (Mem. at 13), because there is no basis for the implication that petitioners want to engage in any such speech. That petitioners might be able to conceive of hypothetical speech that would not endanger the court's staff and the integrity of the proceedings "is not sufficient to render it susceptible to an overbreadth challenge." *People v. Barton*, 8 N.Y.3d 70, 75-76 (2006) (quotation marks omitted).

23. Supreme Court also reasonably determined that no less-restrictive alternative would adequately protect the court's interests in safety and trial integrity. Indeed, an express warning against personal attacks on the court's staff failed to dissuade Mr. Trump from making the social media post that gave rise to the October 3 order (Pet., Ex. F, Oct. 3 Tr. at 270, NYSCEF Doc. No. 1). *See Trump*, 2023 WL 8517991, at *19-20.

24. Petitioners err in asserting that a "clear and present danger" of unlawful action was required to justify Supreme Court's October 3 order. *See* Mem. at 12-13. As the D.C. Circuit has explained, that standard simply is not applicable where (as here) a court imposes process-protective restrictions on the speech of participants in a trial. *See Trump*, 2023 WL 8517991, at *12-13. Rather, as this Court has explained, a speech-restrictive order on trial participants during ongoing judicial proceedings

requires only a "showing of a necessity for such restraint and a determination that less restrictive alternatives" are unavailable. *Cooperman*, 116 A.D.2d at 293.

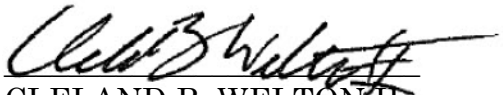
25. Finally, Supreme Court's November 3 order prohibiting the parties' counsel from making statements about confidential communications between the court's staff and the court also comports with free-speech principles. (*See* Pet. Ex. J, Nov. 3 Order at 3, NYSCEF Doc. No. 1.) The court issued the order only after petitioners' counsel persisted in making "inappropriate remarks about [the court's] Principal Law Clerk, falsely accusing her of bias against them and of improperly influencing the ongoing bench trial" even after the court had squarely rejected counsel's arguments on the record. (*See* Fan Affirm. in Opp'n to Stay ¶ 54, NYSCEF Doc. No. 8.) In prohibiting counsel from making further irrelevant, vexatious, and unprofessional comments in court, Supreme Court acted well within its broad discretion to "regulate the conduct of the trial." *See* C.P.L.R. 4011; *see Pramer S.C.A. v. Abaplus Intl. Corp.*, 123 A.D.3d 474, 474 (1st Dep't 2014).

26. Although counsel may have a right to make a litigation record and to preserve issues for appeal (*see* Mem. at 14), Supreme Court made clear that petitioners' objections to the court's communications with its staff (the only subject covered by the November 3 order) are well documented and "fully preserved for the duration of the proceedings." (Pet., Ex. J, Nov. 3 Order at 2, NYSCEF Doc. No. 1.) Counsel does not have any right to keep raising arguments that Supreme Court has already considered and rejected.

27. Insofar as the November 3 order applies to statements made by the parties' counsel outside the courtroom, it does not violate their free-speech rights for the same reasons that the October 3 order does not violate the parties' free-speech rights (see *supra* ¶¶ 19-24). The November 3 order is extremely limited, prohibiting discussion only of Supreme Court's communications with its staff—an exceedingly narrow topic that petitioners' counsel have already discussed at length on the record. (*See* Pet., Ex. J, Nov. 3 Order at 2, NYSCEF Doc. No. 1.) The order does not prevent counsel from publicly commenting on any other aspect of the proceedings. (*See id.*) In addition, as Supreme Court explained, the same concerns animating the imposition of the October 3 order—threats to and harassment of the court's staff—also animate the November 3 order. (*Id.*) And the court reasonably concluded that the November 3 order was necessary in light of counsel's failure to refrain from raising "repeated, inappropriate remarks about [his] Principal Law Clerk" (*id.*). *See Cooperman*, 116 A.D.2d at 294.

WHEREFORE, the motion for leave to appeal should be denied.

Dated: New York, New York
December 10, 2023



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