SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

DONALD J. TRUMP,

Defendant.

Index No. 71543-23

PRESIDENT DONALD J. TRUMP'S OPPOSITION TO THE PEOPLE'S MOTION FOR AN ORDER RESTRICTING EXTRAJUDICIAL STATEMENTS

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I. INTRODUCTION

President Donald J. Trump respectfully submits this response in opposition to the People's motion for a gag order (the "Motion").

President Trump is the presumptive Republican nominee and leading candidate in the 2024 election. The Supreme Court has "never allowed the government to prohibit candidates from communicating relevant information to voters during an election." *Republican Party of Minnesota v. White*, 536 U.S. 765, 781-82 (2002). Therefore, it would be unconstitutional and unlawful to impose a prior restraint on President Trump's First Amendment speech, which, notably, the People have requested around the time of Super Tuesday and as President Biden prepares to use the State of the Union address for his own political advocacy—to assail President Trump based on politically motivated indictments, including the one in this case.

Gag orders are extraordinary prior restraints on protected speech, subject to the most exacting scrutiny of any First Amendment issue under the state and federal Constitutions. The Court recognized this at President Trump's arraignment:

> Certainly, the Court would not impose a gag order at this time even if it were requested. Such restraints are the most serious and least intolerable on First Amendment rights. That does apply doubly to Mr. Trump, because he is a candidate for the presidency of the United States. So, those First Amendment rights are critically important, obviously.

4/4/23 Tr. 12.

The People seek the application of "less demanding" standards. Mot. at 21. The Court should reject that invitation to error. The People also ignore the fact that binding Supreme Court precedent requires a "solidity of evidence" to support a gag order. *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946). They have not produced such evidence. The Court has already admonished the parties regarding extrajudicial statements and entered a protective order that restricts references to third parties. The People point to no issues with the defense's compliance with those orders. It

is of no relevance for purposes of the prior restraint sought by the People that courts in other cases—with different facts, different witnesses, and at different times—have entered other gag orders that violated President Trump's constitutional rights and have been contested in appellate proceedings. The People must justify the order they seek based on actual evidence from the here-and-now. That record includes President Trump's compliance with the other gag orders. Moreover, substantially all of the statements cited by the People, to the limited extent they relate to this case at all, occurred at least eight months ago, between March and June 2023. The People's failure to point to actual prejudice from those earlier statements, such as an indication that witnesses in this case feel harassed or intimidated, which they have not presented evidence of, undercuts their application significantly.

Finally, the prior restraint sought by the People relating to juror information is unnecessary. The defense has consented to the entry of an order relating to juror anonymity, subject to the modifications and caveats discussed in our separate March 4, 2024 filing. Moreover, in an order issued in *Capital Cities Media, Inc. v. Toole*, Justice Brennan expressed concern about a gag order that prevented the publication of "the names or addresses of any juror" in a high-profile criminal case. 463 U.S. 1303, 1304 (1983). Under *Toole*, a gag order would be unlawful because the "less restrictive alternatives" include the separate consented-to protective order addressing this issue. Accordingly, for all of these reasons, the Court should deny the People's motion for a gag order.

II. APPLICABLE LAW

A. Gag Orders On Criminal Defendants Require A Showing Of "Clear And Present Danger"

The United States Supreme Court held in *Landmark Communications Inc. v. Virginia* that restrictions on speech regarding pending judicial proceedings require a showing of "clear and present danger to the administration of justice." 435 U.S. 829, 844, 844 (1978). "The operations

of the courts and the judicial conduct of judges are matters of utmost public concern." *Id*. at 839. Further, this public concern reaches its pinnacle in criminal cases, where public scrutiny and criticism of court proceedings "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Id*. (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964) (holding that "repression" of speech about court proceedings "can be justified, if at all, only by a clear and present danger of the obstruction of justice"); *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946) (requiring "a clear and present danger to judicial administration"); *Bridges v. California*, 314 U.S. 252, 262 (1941) ("[T]he 'clear and present danger' language . . . has afforded practical guidance in a great variety of cases . . . .").

In *United States v. Ford*, the U.S. Court of Appeals for the Sixth Circuit applied the *Landmark Communications* standard to a gag order on a criminal defendant who was a political candidate. 830 F.2d 596, 598 (6th Cir. 1987). Adopting "the exacting 'clear and present danger' test for free speech," the Sixth Circuit reasoned that the First Amendment does not draw distinctions between ordinary individuals and the corporate media: "We see no legitimate reasons for a lower threshold standard for individuals, including defendants, seeking to express themselves outside of court than for the press." *Id.*

> The order in the instant case is clearly overbroad and fails to meet the clear and present danger standard in the context of a restraint on a defendant in a criminal trial. Such a threat must be specific, not general. It must be much more than a possibility or a "reasonable likelihood" in the future. It must be a "serious and imminent threat" of a specific nature, the remedy for which can be narrowly tailored in an injunctive order.

Id. at 600.

B. The People Should Not Be Permitted To Proceed On A Lower Standard

The People disregard the constitutionally fraught nature of their position and prefer a "less demanding" standard. Mot. at 21 (cleaned up). Ignoring cases like *Brummer v. Wey*, 166 A.D.3d 475, 476 (1st Dep't 2018)—where the First Department applied the "clear and present danger" standard to a prior restraint—the People argue that the Court should rely on the fractured opinions in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1063 (1991), as well *Nat'l Broad. Co. v. Cooperman*, 116 A.D.2d 287, 289 (2d Dep't 1986), and *Lowinger v. Lowinger*, 264 A.D.2d 763, 763 (2d Dep't 1999). Mot. at 21. The People are wrong.

The brief ruling in *Lowinger* struck a gag order in a matrimonial proceeding. The case offers no guidance about the appropriate standard for imposing a gag order on a criminal defendant—let alone a criminal defendant who is the leading candidate for President of the United States. The Second Department simply cited *Cooperman* and *Sheppard v. Maxwell*, 384 U.S. 333 (1966), without analysis. *Maxwell* predated *Landmark Communications* by more than a decade and the case did not involve a gag order, which are considerations that render *Maxwell* wholly inapposite for purposes of the People's motion.

Gentile addressed a gag order on counsel, not a criminal defendant, and the splintered opinions in that case contrasted the rights of an "attorney" with the rights of an "ordinary citizen" or "private citizen." *Id*. at 1071, 1072 n.5; *see also id*. at 1074 (reasoning that "lawyers in pending cases [a]re subject to ethical restrictions on speech to which an ordinary citizen would not be"). So too in *Cooperman*. *See* 116 A.D.2d at 288 (describing "oral ruling in a pending criminal action . . . which directs all counsel involved in the action to refrain from communicating with members of the news media on matters related to the case"). In *Gentile*, Justice Kennedy noted that the standard applied in that case was intended to "approximate the clear and present danger test," and

that the "difference" between the two standards "could prove mere semantics." *Id*. at 1037 (plurality opinion).

The People also acknowledge the alternative standard invented by the D.C. Circuit in *United States v. Trump*, 88 F.4th 990, 1007 (D.C. Cir. 2023): "[S]ignificant and imminent risk to the fair and orderly administration of justice, and that no less restrictive alternatives would adequately address that risk." Mot. at 21. The *Trump* panel "assum[ed] without deciding that the most demanding scrutiny applies to the district court's speech-restricting Order." 88 F.4th at 1008. Thus, the case provides no basis for ignoring *Landmark Communications*, *United States v. Brown*, and other cases applying the "clear and present danger" standard in favor of that erroneous ruling. The fact that the D.C. Circuit found that statements at issue in that case, at the time the trial court imposed a gag order in that case, says precious little about whether the People's evidence "satisfies even 'the most demanding scrutiny.'" Mot. at 21 (quoting *Trump*, 88 F.4th at 1008).

C. The People Must Meet Their Burden With A "Solidity Of Evidence"

The Supreme Court has emphasized the importance of the evidentiary burden required for pretrial speech restrictions, requiring a "solidity of evidence" to justify them. *Pennekamp*, 328 U.S. at 347; *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976) (invalidating a prior restraint where "the record is lacking in evidence to support such a finding"). Similarly, the First Department has noted that "a party seeking to obtain such a restraint bears a correspondingly *heavy burden* of demonstrating justification for its imposition." *Ash v. Board of Managers of 155 Condominium*, 44 A.D.3d 324, 324 (1st Dep't 2007) (emphasis added) (citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) and *Near v. Minnesota*, 283 U.S. 697, 713 (1931)).

To justify a prior restraint, "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished, and . . . a solidity of evidence is

necessary to make the requisite showing of imminence. The danger must not be remote or even probable; it must immediately imperil." *Landmark Commc'ns,* 435 U.S. at 845 (cleaned up) (quoting *Bridges,* 314 U.S. at 263; *Pennekamp,* 328 U.S. at 347; and *Craig v. Harney,* 331 U.S. 367, 376 (1947)). The People have not come close to meeting that burden.

III. ARGUMENT

A. The Proposed Gag Order Must Be Subject To The Most Exacting Scrutiny

The proposed gag order is a quintessential prior restraint. "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." *Ash v. Board of Managers of 155 Condominium*, 44 A.D.3d 324, 324 (1st Dep't 2007) (quoting *United States v. Quattrone*, 402 F.3d 304, 309 (2d Cir. 2005)); *see also* NY Const., 1st Amendment ("Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right.").

"[I]t has been long established that such restraints 'are the most serious and the least tolerable infringement on First Amendment rights.'" *Id.* at 324-25 (quoting *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976)). They are "one of the most extraordinary remedies known to our jurisprudence," *Nebraska,* 427 U.S. at 562, and they are "accorded the most exacting scrutiny," *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 102 (1979). For example, in *Toole*, Justice Brennan stayed a gag order that prevented the publication of "the names or addresses of any juror" in a high-profile criminal case. 463 U.S. at 1304. Emphasizing "the special importance of swift action to guard against the threat to First Amendment values posed by prior restraints," Justice Brennan held that "even a short-lived 'gag' order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests

as long as it remains in effect." *Id.* He questioned whether any justification could support such an order:

> Our precedents make clear . . . that far more justification than appears on this record would be necessary to show that this categorical, permanent prohibition against publishing information already in the public record was 'narrowly tailored to serve that interest,' if indeed any justification would suffice to sustain a permanent order.

Id. at 1306; *see also Ash*, 44 A.D.3d at 325 ("[A]ny imposition of prior restraint, whatever the form, bears a heavy presumption against its constitutional validity." (cleaned up)). The People's motion lacks the evidentiary justification that Justice Brenan sought and that is required under the Supreme Court's other cases.

B. President Trump's Campaign Speech Requires Heightened Protection

The First Amendment under the State and federal Constitutions requires that President Trump's ability to respond to public attacks relating to this case, as he continues his leading campaign for the Presidency, be afforded the highest level of constitutional protections.

"Speech on matters of public concern is at the heart of the First Amendment's protection. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government." *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (cleaned up). "No form of speech is entitled to greater constitutional protection" than "[c]ore political speech." *McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334, 347 (1995). Likewise, no form of core political speech receives greater protection than campaign speech. The First Amendment's "constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Campaign speech lies "at the core of our electoral process of the First Amendment freedoms—an area . . . where protection of robust discussion is at its zenith." *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (cleaned up).

The First Amendment's "protection afforded is to the communication, to its source and to its recipients both." *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976); *see also Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) (recognizing the right to "speak and listen, and then . . . speak and listen once more," as a "fundamental principle of the First Amendment"); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969); *Armstrong v. D.C. Pub. Library*, 154 F. Supp. 2d 67, 75 (D.D.C. 2001) (citing "long-standing precedent supporting plaintiff's First Amendment right to receive information and ideas"). This right to listen to President Trump's campaign speech has its "fullest and most urgent application precisely to the conduct of campaigns for political office," especially for the Presidency. *Susan B. Anthony List*, 573 U.S. at 162. A restriction on President Trump's speech therefore inflicts a "reciprocal" injury on the tens of millions of Americans who listen to him. *Va. State Bd. of Pharm.*, 425 U.S. at 757.

American voters have the First Amendment right to hear President Trump's uncensored voice on all issues that relate to this case. President Trump's political opponents have, and will continue to, attack him based on this case. The voters have the right to listen to President Trump's unfettered responses to those attacks—not just one side of that debate. Neither the First Amendment nor the New York Constitution permits the government "to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

The People's motion vividly illustrates this concern. The People repeatedly cite, as supposed justifications for a gag order, statements by President Trump that plainly constitute core political speech on matters of great public concern and criticism of major public figures. Such statements stand at the zenith of First Amendment protection and could not plausibly provide a

basis for any gag order, least of all a gag order targeting a political candidate who daily faces attacks on the basis of this case. *See, e.g.*, Mot. ¶ 10 (criticisms of D.A. Bragg, political operatives, and the media); *id.* ¶ 12 (similar statements); *id.* ¶ 23 (criticism of federal district judge); *id.* ¶ 25 (criticism of federal Special Counsel Jack Smith); *id.* ¶ 34 (criticism of New York Attorney General and state judge); *see also Rosenblatt v. Baer*, 383 U.S. 75, 85-86 (1966); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974). President Trump is entitled to criticize these public figures, and the voters are entitled to hear President Trump's criticism of them, especially as the Presidential campaign proceeds.

In *United States v. Brown*, the Fifth Circuit noted that "[t]he district court also made special allowances for Brown's re-election campaign by lifting most of the order . . . for the duration of the campaign . . . . Brown was able to answer, without hindrance, the charges of his opponents regarding his indictment throughout the race." 218 F.3d at 430. Similarly, in *United States v. Ford*, the U.S. Court of Appeals for the Sixth Circuit gave Congressman Ford unfettered latitude to speak about his prosecution during his campaign, emphasizing that "the defendant, a Democrat . . . is entitled to attack the alleged political motives of the Republican administration which he claims is persecuting him because of his political views and his race." 830 F.2d at 600-01. Congressman Ford, the court reasoned, "will soon be up for reelection. His opponents will attack him as an indicted felon." *Id.* at 601. "He will be unable to respond in kind if the District Court's order remains in place. He will be unable to inform his constituents of his point of view." *Id.*

Thus, in prior cases involving criminal defendants who were political candidates, the courts imposed virtually no restrictions on their speech. Here, the speaker is the presumptive Republican nominee and leading candidate for President of the United States. The proposed gag order would restrict speech that is inextricably entwined with his campaign because these issues are "central to

[President Biden's] re-election argument."[1] President Trump's opponents—including District Attorney Bragg and potential witnesses in this case—have attacked President Trump based on the false allegations in this matter. "Criticism of government is at the very center of the constitutionally protected area of free discussion" and so such criticisms "must be free, lest criticism of government itself be penalized." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966); *see also Guerrero v. Carva*, 10 A.D.3d 105, 111 (1st Dep't 2004) (holding that "expressions of opinion" are protected by the First Amendment).

Like District Attorney Bragg, some potential witnesses have "thrust" themselves "into the vortex of this public issue." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974). For example, Stephanie Clifford made light of President Trump's presidential campaign during an April 2023 interview with NPR.[2] Last month, during yet another self-serving interview to promote himself and the stories he has fabricated, Cohen—himself a potential candidate[3]—claimed falsely that President Trump was only campaigning for the purpose of "saving himself," "both financially, as well as criminally."[4] Based on Cohen's record to date, there is every reason to believe that he will continue to comment on this case in podcasts and social media during the trial, as he has done

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[1] Kevin Liptak, et al., *Trump's Third Indictment Is the Most Personal – and Trickiest – One for Biden*, CNN (Aug. 2, 2023), https://www.cnn.com/2023/08/02/politics/joe-biden-donald-trump-indictment/index.html.

[2] Emily Olson, *Stormy Daniels says she's not yet 'vindicated' by Trump's indictment*, NPR (Apr. 7, 2023, 11:43 am) ("When asked whether she was trying to derail Trump's 2024 presidential campaign, Daniels laughed. 'He doesn't need my help for that. He's going to do that on his own,' she quipped."), https://www.npr.org/2023/04/07/1168604443/stormy-daniels-piers-morgan-interview-trump.

[3] Tara Suter, *Former Trump attorney Michael Cohen considering NY congressional bid*, THE HILL (Aug. 11, 2023), https://thehill.com/homenews/campaign/4148668-former-trump-attorney-michael-cohen-considering-ny-congressional-bid.

[4] Tara Suter, *Cohen After Trump fraud Verdict: His Only Out From Fines, Incarceration is Winning The Election*, THE HILL (Feb. 16, 2024), https://thehill.com/regulation/court-battles/4473971-cohen-trump-fraud-verdict-win-election-2024.

continuously since arraignment not-withstanding the Court's request that he stop. President Trump is entitled to respond to those types of attacks, and the proposed gag order would impermissibly restrict his ability to do so.

C. The Proposed Gag Order Would Impose An Impermissible Heckler's Veto

The central justification proffered by the People for the gag order is to somehow protect trial participants from supposed "threats" and "harassment" by independent third parties. *E.g.*, Mot. at 6. The People do not contend that that any of President Trump's public statements constitute true threats, "fighting words," or incitement to imminent lawless action. *See, e.g.*, *Counterman v. Colorado*, 600 U.S. 66, 73 (2023); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Thus, the proposed gag order restricts President Trump's speech based solely on the anticipated *reaction* of unidentified, independent third parties.

This is a classic heckler's veto, which the First Amendment categorically forbids. Under the First Amendment, public speakers "are not chargeable with the danger" that their audiences "might react with disorder or violence." *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966) (plurality op.). "[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise." *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (cleaned up) (citing *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963), *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963)); *see also, e.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) ("Speech cannot be . . . punished or banned, simply because it might offend a hostile mob."); *Collin v. Chicago Park Dist.*, 460 F.2d 746, 754 (7th Cir. 1972). "The Supreme Court has made it clear . . . that the government may not prohibit speech under a 'secondary effects' rationale based solely on the emotive impact that its . . . content may have on a listener." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir. 2001) (citing cases); *see also Matal v. Tam*, 582 U.S. 218, 250

(2017) (Kennedy, J., concurring in part and concurring in the judgment) ("The Government may not . . . t[ie] censorship to the reaction of the speaker's audience."); *Forsyth County*, 505 U.S. at 134 ("Listeners' reaction to speech is not a content-neutral basis for regulation.").

Speech that falls short of incitement may not be silenced solely because it might inspire others to engage in violence or other unruly behavior—regardless of how predictable (or not) those unruly reactions might be. *See Trump*, 88 F.4th at 1007 (reasoning that "the constitutional path for the presiding judge to protect both free speech and the fair and orderly administration of justice was not to limit what outsiders can say about the trial or trial participants"). The Supreme Court's incitement "decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447. A speech restriction that seeks to silence speech because it might provoke violence or unlawful behavior from the audience "impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control." *Id.* (citing eight cases).

D. The People Have Not Met Their Burden Of Justifying A Gag Order

As in *Toole*, "far more justification than appears on this record would be necessary" to justify the proposed gag order, "if indeed any justification would suffice to sustain" it. 463 U.S. at 1306. The People cannot obtain a gag order in this case by pointing to gag orders in other cases involving President Trump. *See In re New York Times Co.*, 878 F.2d 67, 68 (2d Cir. 1989) (vacating order imposed based on issues "in other cases, not in this case"). Rather, they must demonstrate that President Trump's protected speech poses a "clear and present danger to the

administration of justice" in this case. *Landmark Commc'ns*, 435 U.S. at 844; *Ford*, 830 F.2d at 598. The prosecution must make that showing of immediacy based on a "solidity of evidence." *Pennekamp*, 328 U.S. at 347; *see also Landmark Commc'ns*, 435 U.S. at 843 (holding that "actual facts" are necessary to support a gag order); *Nebraska Press Ass'n*, 427 U.S. at 569 (reasoning that gag orders are unlawful where "the record is lacking in evidence to support"). The People must meet that burden based on the present—not years, or even months ago, when other courts facing different circumstances entered constitutionally suspect gag orders.

The People's central rationale for a gag order is the aforementioned impermissible heckler's veto. In their view, unidentified third parties *might* engage in threats or harassment. But they have not substantiated that position with respect to this year and this case. Instead, they rely principally on an affidavit from Nicholas Pistilli, who focuses on events from nearly a year ago in March and April 2023. *See* Mot. Ex. 13 ¶ 10 (referring to "three weeks following March 18, 2023"); *id.* ¶ 12 (referring to a "peak" in "March 2023"); *id.* ¶ 13 (describing alleged threats by third parties in March and April 2023); *id.* ¶ 14 (describing so-called "terroristic" threats by third parties in March and April 2023). The strained nature of the People's position is illustrated by the fact that Pistilli emphasizes the "volume" of threats despite no apparent connection to this case. *See id.* ¶ 8; *see also id.* ¶¶ 11, 13(b), 13(d), 14(a). The volume of so-called threats, without any connection to this case or President Trump, is far from the required "solidity of evidence."

President Trump's statements and social media posts concerning District Attorney Bragg have no bearing on the Court's consideration of the proposed gag order. Bragg is not covered by the proposed order. Nor could he be. "As a high-ranking government official who exercises ultimate control over the conduct of this prosecution, the [District Attorney] is no more entitled to protection from lawful public criticism than is the institution he represents." *Trump*, 88 F.4th at

1026; *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964) ("Criticism of [] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.").

The People have not substantiated their claim that President Trump has "singled out several prosecutors in the District Attorney's Office." *See* Mot. at 5 (citing Ex. 1 at 14, 45, 48, 49). The Pistilli affidavit contains vague references to threats to DANY "employees," without even alleging that the threats related to this case or President Trump. *Id.* Ex. 13 ¶¶ 5, 6, 12. The People also cite social media posts relating to one prosecutor, Matthew Colangelo, who transferred from President Biden's Justice Department to DANY for purposes of this case. The political implications of that move are manifest and appropriate topics for public debate. In any event, the posts cited by the People occurred in March and June 2023. *Id.* Ex. 1 at 14 and 48.

Finally, the People have not demonstrated that a gag order as to juror information is appropriate based on the argument that "[t]here is good reason to believe that prospective jurors will be reluctant to serve on the jury if they believe that defendant will follow his past practice of targeting them with public attacks." Mot. at 25. Today, President Trump consented to an order, with modifications, requiring that the information not be released publicly. In addition, such a gag order would be inconsistent with *Toole*, 463 U.S. at 1304. Lastly, even if the People were correct that jurors would be "reluctant" to serve in the absence of a gag order, Mot. at 25, it would be a blatant violation of President Trump's right to a fair trial for the Court to inform potential or actual jurors of prior restraints on President Trump's speech.

E. The Proposed Gag Order Improperly Ignores Less Restrictive Means And Is Not Narrowly Tailored

Even the cases relied on by the People, such as *Cooperman*, require "a determination that less restrictive alternatives would not be just as effective in assuring the defendant a fair trial." 116 A.D.2d at 293.

The People's proposed gag order ignores an obvious less-restrictive alternative: continued voluntary compliance with existing orders. *See Trump*, 88 F.4th at 1017 ("We note that the district court tried a less restrictive approach first. Shortly after the indictment, she cautioned the parties and counsel against speech that would prejudice the trial process and sought their voluntary compliance."). This is the appropriate course of action given the track record of historical compliance in this case. Last April, Your Honor directed President Trump to "[p]lease refrain from making comments or engaging in conduct that has the potential to invite violence, create civil unrest, or jeopardize the safety or well-being of any individuals." 4/4/2023 Tr. 133. In May 2023, the Court entered a protective order prohibiting the disclosure of the names and identifying information of certain covered personnel until the commencement of trial. President Trump and defense counsel have taken great care to ensure compliance with the terms of that order, and the People do not suggest otherwise.

The People's proposed gag order is also unworkable and impermissibly vague. *See, e.g.*, *People v. Barton*, 8 N.Y.3d 70, 75 (2006) ("The test for determining overbreadth is whether the law on its face prohibits a real and substantial amount of constitutionally protected conduct."). The Court is required to interpret the directive "without reference to the defendant's conduct—to decide whether a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *People v. Marquan M.*, 24 N.Y.3d 1, 8 (2014) (cleaned up). *Gentile* invalidated as vague a virtually identical scheme—a rule that authorized "general"

statements about a case but prohibited "elaboration." 501 U.S. at 1048-49. Noting that "'general' and 'elaboration' are both classic terms of degree," the Supreme Court held that lawyers governed by the rule must "guess at its contours." *Id*. The People's proposed gag order chills speech in advance, as every word uttered by President Trump would require instant replay review "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). For this additional reason, the Court should reject the proposed gag order.

IV. CONCLUSION

For all of the reasons described above, President Trump respectfully requests that the Court deny the People's motion for a gag order.

Dated: March 4, 2024
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