20-3507

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES,

Petitioner,

—against—

PEN AMERICAN CENTER, INC.,

Respondent.

ON PETITION TO APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
CASE NO. 18-CV-9433 (LGS)
THE HONORABLE LORNA G. SCHOFIELD

BRIEF IN OPPOSITION TO PETITION FOR PERMISSION TO APPEAL AN INTERLOCUTORY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK PURSUANT TO 28 U.S.C. §1292(b)

KRISTY PARKER (*pro hac vice*)
THE PROTECT DEMOCRACY PROJECT, INC.
2020 Pennsylvania Avenue, NW, Suite 163
Washington, DC 20006
(202) 849-9307

LAURENCE M. SCHWARTZTOL
JUSTIN FLORENCE (*pro hac vice*)
THE PROTECT DEMOCRACY PROJECT, INC.
10 Ware Street
Cambridge, Massachusetts 02138
(202) 599-0466

JOHN LANGFORD
THE PROTECT DEMOCRACY PROJECT, INC.
555 West 5th Street
Los Angeles, California 90013
(202) 579-4582

ROBERT CORN-REVERE
RONALD G. LONDON
CHELSEA T. KELLY
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW, Suite 800
Washington, DC 20006
(202) 973-4200

DAVID A. SCHULZ
MEDIA FREEDOM AND INFORMATION ACCESS CLINIC
FLOYD ABRAMS INSTITUTE FOR FREEDOM OF EXPRESSION
YALE LAW SCHOOL
1675 Broadway, 19th Floor
New York, New York 10019
(212) 850-6103

Counsel for Respondent

CORPORATE DISCLOSURE STATEMENT

Plaintiff-Respondent PEN American Center, Inc. has no corporate parents and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

Rules

Other Authorities

Constitutional Provisions

Pursuant to 28 U.S.C. §1292(b) and Rule 5 of the Federal Rules of Appellate Procedure, Plaintiff opposes the President's petition for permission to appeal the district court's interlocutory order denying in part his motion to dismiss Plaintiff's Amended Complaint.[1]

PRELIMINARY STATEMENT

Plaintiff PEN American Center, Inc., ("PEN America") is one of our country's largest and oldest organizations of writers and journalists, with a mission of celebrating and defending free expression. Plaintiff filed this lawsuit to stop President Trump from using the powers of his office to threaten and retaliate against journalists and media commentators in order to suppress their speech in violation of the First Amendment. The President's First Amendment violations are flagrant and strike at the core of every American's right to dissent and to receive information from a free press that is uninhibited by government censorship. As detailed in Plaintiff's Amended Complaint, the President has repeatedly threatened to suspend the press passes of journalists whose coverage he dislikes, and has done so in the case of PEN America member and CNN reporter Jim Acosta. The President has likewise repeatedly threatened to revoke the security clearances of former government officials who have criticized him in the media, and has followed through by directing the revocation of former CIA Director John Brennan's clearance. The President's First

[1] This brief was prepared with assistance from Yale Law School students Jackson Busch and Sara Worth.

Amendment violations have inflicted ongoing injury to Plaintiff's members and to its own right to receive speech and are anathema in a constitutional democracy rooted in the rule of law.

Following briefing on the President's motion to dismiss, the district court correctly held that Plaintiff's press corps and security clearance claims were plausibly stated and justiciable, and that its injuries were redressable by declaratory relief.[2] Petitioner's Addendum ("Add.") at 8, 22-23.

Yet according to the President, he is above the law and cannot be "supervised" by the courts—even when the courts do no more than "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), as they have been empowered to do for more than 200 years, and even when the President engages in clearly unconstitutional conduct. Throughout his time in office, the President has advanced extreme claims to unbridled power in numerous contexts, and this case is no different. The President has filed a petition asserting that he has unreviewable authority to violate the Constitution, specifically the First Amendment, in his interactions with the press and media commentators. The President argues further that the district court erred when it held that Plaintiff had standing to sue on plausibly stated claims. The President is wrong, the questions presented for review are not close, and this Court should reject the petition, especially at this early stage of Plaintiff's lawsuit.

[2] The district court dismissed Plaintiff's remaining claims on standing grounds and held that injunctive relief is not appropriate against the President in this case.

STANDARD OF REVIEW

Plaintiff's lawsuit is before this Court on the President's petition for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b). An appeal of an interlocutory order is "a rare exception to the final judgment rule," *Koehler v. Bank of Berm. Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996), and is "especially rare in the early stages of litigation," *In re Facebook, Inc.*, 986 F. Supp. 2d 524, 533 (S.D.N.Y. 2014). Interlocutory appeal "is limited to 'extraordinary cases where appellate review might avoid protracted and expensive litigation,' ... and is not intended as a vehicle to provide early review of difficult rulings in hard cases." *In re S. African Apartheid Litig.*, 624 F. Supp. 2d 336, 339 (S.D.N.Y. 2009) (internal citations omitted).

To warrant extraordinary review under Section 1292(b), the order being appealed must "(1) involve[] a controlling question of law (2) as to which there is substantial ground for difference of opinion," and the movant must also show that "(3) an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The President's petition fails to meet this exacting standard.

SUMMARY OF ARGUMENT

The President correctly recounts the district court's certification of its order for interlocutory appeal based on the court's conclusion that there is a substantial ground for difference of opinion regarding whether the court may issue a declaratory judgment against the President when he violates the First Amendment. However, the

district court erred on this point, and the President's petition falls short of satisfying the test for interlocutory review.

The President has raised four questions he claims meet the standard for permitting an extraordinary interlocutory appeal: whether the President is immune from entry of a declaratory judgment against him; whether "generalized allegations of a chilling effect on the speech of third parties" suffice to support Plaintiff's standing to sue; "whether the First Amendment prohibits the President and his subordinates from choosing to provide greater access to some reporters and less access to other reporters based on the reporters' coverage"; and whether Plaintiff can bring its security clearance claim "based on generalized allegations of a chilling effect on the speech of third parties." The President's position on each of these questions lacks merit; several of the questions flatly mischaracterize the Amended Complaint; and none of them—neither the single one the district court certified, nor the other three it did not—warrant review at this early stage of the litigation.

Finally, the President has framed his arguments against a misleading backdrop. The President contends that it is "essential" that this Court grant the petition because the President is the defendant, his motives are at issue, and the continuation of this case will necessarily involve protracted discovery that will implicate separation of powers concerns. In doing so, he ignores Plaintiff's request for permission from the district court to move for partial summary judgment *prior to discovery* on its claims that the President issued impermissible coercive threats against journalists and security

clearance-holders. Those claims do not require a showing of any chilling effect on the targets of the threats and do not depend on the President's motive, and their resolution on summary judgment would significantly impact the direction of further litigation. Respondent's Addendum ("Resp. Add.") at 1. Furthermore, the President makes no mention of the district court's role in balancing the various interests at stake between enforcing Plaintiff's First Amendment rights and the President's Article II prerogatives in crafting appropriate equitable relief. The President seeks instead to skip over that critical step in the judicial process.

For all these reasons and those stated below, the President's petition should be denied.

REASONS THE PETITION SHOULD NOT BE GRANTED

I. The question of whether the President is subject to a declaratory judgment for his discrete actions violating the First Amendment does not meet the standard for interlocutory review.

The President's claim that there is substantial legal disagreement over whether he is subject to the imposition of a declaratory judgment relies on a fundamental mischaracterization of Plaintiff's claims. This lawsuit is not, as the President contends, one that seeks broad "judicial supervision over [his] *relationship* with the press and *decisions* related to security clearances." Petitioner's Brief ("Pet. Br.") at 2. (emphases added). Plaintiff's claims are instead narrowly focused on whether the President can threaten and direct *retaliation* against the press and media commentators *because of their speech*—discrete conduct that clearly violates the First Amendment. When Plaintiff's

claims are considered for what they are, there is no ground for disagreement that an Article III court has the authority simply to declare that the President's actions violate the Constitution. Moreover, to the extent a disagreement exits, appellate review is not appropriate before the district court has performed its unique duty to consider the interests at stake and craft relief.

A. The President is not immune from the imposition of declaratory relief when he threatens and retaliates against journalists in violation of the First Amendment.

The President's claim that he is exempt from declaratory relief rests on his attendant claim that he has "discretion" to threaten and direct retaliation against journalists and media commentators because he dislikes what they say and how they cover him (he does not), and on *dicta* that he attempts to cast as controlling legal authority (it is not). The President argues as if it is a settled question that courts have no authority to "supervise" the President for anything he might do, including taking actions that violate clear constitutional prohibitions. But this extreme view of Presidential executive authority is not the law, and it cuts directly against the founding framework of our Constitution, which provides for three separate, co-equal branches of government.[3]

[3] The President's focus on his "discretionary" powers derives from *Mississippi v. Johnson*, 71 U.S. 475 (1866), which is properly understood as a case elaborating the political question doctrine. The primary issue in this case is not whether the President has discretionary policy-making authority (he does), but whether he has unreviewable authority to violate explicit constitutional mandates (he does not).

The President relies on Justice Scalia's concurring opinion in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), for the proposition that he is not subject to declaratory relief in his official capacity. That reliance is misplaced, not least because the Supreme Court itself has never issued such a holding. *See* Patricia M. Wald & Jonathan Seigel, *The D.C. Circuit and the Struggle for Control of Presidential Information*, 90 Geo. L.J. 737, 758 (2002). Instead, controlling law holds that while the President certainly does have broad discretion over many things—including how he interacts with the press and who gets access to the government's national security secrets—he is not permitted to violate the Constitution, and is subject to equitable relief if he does. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."); *Nixon v. Fitzgerald*, 457 U.S. 731, 753-54 (1982) (Separation of powers "does not bar every exercise of jurisdiction over the President of the United States."); *Nixon v. Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) (explaining that if "the president himself" committed a constitutional violation, "the court's order must run directly to the president"); *Halperin v. Kissinger*, 606 F.2d 1192, 1211–12 (D.C. Cir. 1979) ("[A] proper regard for separation of powers does not require that the courts meekly avert their eyes from presidential excesses while invoking a sterile view of three branches of government entirely insulated from each other."); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 579 (S.D.N.Y. 2018)

("No government official, after all, possesses the discretion to act unconstitutionally."), *aff'd*, 928 F.3d 226 (2d Cir. 2019).

As the Supreme Court has repeatedly explained in the First Amendment context, though the government may deny an individual a valuable government benefit "for any number of reasons"—or no reason at all—"there are some reasons upon which the government may not rely." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see also Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 674 (1996). The government cannot "deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially[] his interest in freedom of speech." *Sindermann*, 408 U.S. at 597. Of particular relevance here, "[o]fficial reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right,'" and "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions … for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588, n.10 (1998)). In this case, an order declaring that the President's threats and retaliatory acts violate the First Amendment would thus not be an incursion on the President's lawful exercise of his executive powers.

In its order on the President's motion to dismiss, the district court concluded at the outset that injunctive relief would not be appropriate in this case, so the question before this Court concerns only whether a court has authority to declare that the

President's actions violate the First Amendment. No controlling authority precludes an Article III court from telling the President that his actions violate the Constitution, and the President has cited none. The law is clear on this point and has been since 1803, when Chief Justice John Marshall wrote that "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177 (1803). Indeed, the Supreme Court expressly approved a declaratory judgment against President Clinton in *Clinton v. City of New York*, 524 U.S. 417, 421 (1998), for his actions in cancelling various Congressional appropriations via the use of a line-item veto. Multiple federal courts have followed suit in awarding declaratory relief against this President for his unconstitutional actions. *See, e.g., Stone v. Trump*, 400 F. Supp. 3d 317, 359 (D. Md. 2019) (relying on *City of New York*); *Knight First Amendment Inst.*, 302 F. Supp. 3d at 579.

The President's reliance on a concurring opinion by Justice Scalia, who wrote only for himself in *Franklin*, as authority for a blanket prohibition on declaratory judgments against the President is therefore unconvincing. So, too, is his characterization of *dicta* as the "holding" of the D.C. Circuit Court of Appeals in *Newdow v. Roberts*, in stating "[a] court—whether via injunctive or declaratory relief—does not sit in judgment of a President's executive decisions." 603 F.3d 1002, 1012 (D.C. Cir. 2010). Not only was a declaratory judgment against the President not before the D.C. Circuit in *Newdow*, the statement quoted by the President is in error

because, as previously explained—even by the D.C. Circuit—courts *do* sit in judgment of executive decisions that violate the Constitution.

The President's additional argument that declaratory relief is especially inappropriate when it would involve judicial oversight of the President's interactions with the press, Pet. Br. at 13, fares no better, because the opposite is true. The First Amendment, through its press clause, specifically protects freedom of the press, and Plaintiff's lawsuit does not seek to regulate the President's public speech, as the President contends, but rather to hold him accountable for his actions in threatening to use the powers of his office—and actually using those powers—to punish the press and media commentators for *their* speech. *See, e.g.*, *Backpage.com, LLC v. Dart*, 807 F.3d 229, 235 (7th Cir. 2015) ("A government entity … is entitled to say what it wants to say—but only within limits. It is not permitted to employ threats to squelch the free speech of private citizens."). As the district court correctly held, these actions are "classic" First Amendment violations. Add. at 11. They are nothing close to the exercise of "supervisory and policy responsibilities," *Nixon*, 457 U.S. at 750, that comprise the President's executive powers.

Finally, the President's claim that he cannot be subject to the Declaratory Judgment Act absent a clear statement from Congress that the Act applies to the President is specious. The Act is grounded in the principle that Article III courts have authority to say what the law is; there is no indication in *Marbury* or the text of the Act itself that courts were intended to be precluded from doing so *vis-a-vis* the President;

and the Supreme Court has already applied the Act to the President in *City of New York*. None of the cases cited by the President hold otherwise.

B. It is premature to decide whether the President is immune from declaratory relief before the district court has had an opportunity to craft a remedy based on a fully developed record.

Unless the Court is prepared to hold that the President can never under any circumstances be subject to declaratory relief, the question whether the President can be subject to declaratory relief in *this* case will ultimately depend on a balancing test that the district court has yet to apply to the facts of this case. In deciding whether to impose relief against the President, "[a] court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." *Nixon*, 457 U.S. at 754 (citations omitted). Here, the district court has yet to assess why and how it would intrude on the President's authority and the functions of the Executive Branch for a court to declare that the President cannot threaten or direct the revocation of press passes and security clearances to punish the speech of journalists and media commentators. Moreover, the district court has the authority to tailor relief to the facts of the case, and, if needed, authority under the All Writs Act to craft narrowly-drawn relief that runs to the President's subordinates, even if those subordinates are not currently defendants in the case. *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174 (1977) ("The power conferred by the [All Writs Act, 28 U.S.C. § 1651,] extends, under appropriate circumstances, to persons who, though not parties to the original action

or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.").

Where an interlocutory appeal "would necessarily present a mixed question of law and fact, not a controlling issue of pure law," Section 1292(b) certification "is not appropriate." *S.E.C. v. First Jersey Sec., Inc.*, 587 F. Supp. 535, 536 (S.D.N.Y. 1984); *see also, e.g.*, *Century Pac., Inc. v. Hilton Hotels Corp.,* 574 F. Supp. 2d 369, 371–72 (S.D.N.Y. 2008) (same). This principle applies here where the district court has not taken account of the competing interests germane to an appropriate remedy and has not yet exercised its discretion to craft a remedy that may or may not be imposed directly against the President. Finally, the President's claim that any further proceedings in the district court would necessarily involve protracted discovery and litigation over the President's executive privilege fails to account for Plaintiff's pending request to move for pre-discovery summary judgment on its threats claims.[4]

[4] The President did not raise the bulk of the arguments he now advances against the imposition of declaratory relief in his motion to dismiss papers. Plaintiff thus did not have an opportunity to fully brief these issues, and the district court had no opportunity to conduct an inquiry that might have shed additional light on the balancing of interests relevant to appropriate relief. Questions on which the issues are fleshed out in such a preliminary manner are particularly inappropriate for interlocutory review.

II. The President's standing argument does not merit interlocutory review.

The President's second question for interlocutory review—"whether generalized allegations of a chilling effect on third parties are sufficient to support standing"— lacks merit, and the district court was correct to say so. The very question posed by the President fundamentally misconstrues the nature of Plaintiff's First Amendment claims, its legal basis for standing, and the district court's order as to both.

A. Plaintiff's threats claims do not require proof of bad motive or an actual chill on speech, nor do its retaliation claims require proof of actual chill.

The President's arguments concerning the supposed deficiencies in Plaintiff's standing all rest on the claim that Plaintiff is required to allege "that a putative speaker has actually been chilled or injured by a threat." Pet. Br. at 16. This argument entirely disregards the law on coercive threats and misunderstands the law on retaliation.

A government official "who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form." *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d. Cir. 2003); *see also Dart*, 807 F.3d at 230-31 (a "public official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights"). "[S]uch a threat is actionable and thus can be enjoined even if it turns out to

be empty—the victim ignores it, and the threatener folds his tent." *Dart*, 807 F.3d at 231. In other words, a coercive threat itself is an unconstitutional restraint on speech, regardless whether any chill results.

A government official engages in unconstitutional retaliation by using government power to penalize a person or entity for the exercise of First Amendment rights. *Heffernan v. City of Paterson*, 136 S.Ct. 1412, 1418-19 (2016) ("the First Amendment begins by focusing upon the activity of the Government"). A plausible claim for retaliation exists when a plaintiff alleges (1) he or she has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by the exercise of that right; and (3) the defendant's actions caused some injury. *Dorsett v. Cty. of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013). Although actual chill can supply the required injury, it is not the only kind of injury that suffices to prove a retaliation claim. *Id.* For example, this Court has already made clear that the revocation of a valuable government benefit, such as a building permit or a government contract, is a sufficiently concrete non-speech injury to give rise to a First Amendment retaliation claim. *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 92 (2d Cir. 2002); *Zherka v. Amicone*, 634 F.3d 642, 646 (2d Cir. 2011); *Dorsett*, 732 F.3d at 160. The revocation of press passes and security clearances are concrete injuries in themselves and do not require a showing that the government actually succeeded in squelching anyone's speech.

For these reasons, the question for which the President seeks interlocutory review does not present a "controlling question of law."

B. Plaintiff has associational standing to sue.

Beyond the President's mischaracterization of the law, he also inexplicably mischaracterizes Plaintiff's allegations of injury to PEN member and CNN White House correspondent Jim Acosta solely as a "receipt-of-information injury," Pet. Br. at 17, rather than what it is: a direct restriction on Acosta's speech both through ongoing threats and specific retaliatory acts. While Acosta has continued to report on the President, often in a manner that is critical of him and his administration, Acosta was undisputedly stripped of his press pass along with access to the White House for a period of time, had to file a separate lawsuit to get his access restored, and continues to operate under the threat that he will lose his access again because of the President's continuing threats. The President's actions against Acosta more than meet the test for unconstitutional threats and retaliation against him, as well as the test for Plaintiff to assert associational standing based on Acosta's PEN membership.

C. Plaintiff has organizational standing to sue.

The President also misconstrues Plaintiff's organizational standing to sue based on the President's threats and retaliation against journalists and media commentators from whom Plaintiff receives information. In addition to protecting individuals like Acosta from direct restrictions on their own speech, "the First Amendment unwaveringly protects the right to receive information and ideas." *Application of Dow*

Jones & Co. v. Simon, 842 F.2d 603, 607 (2d Cir. 1988). And contrary to the President's claim in his petition, he threatened not only Acosta with loss of access to the White House, but all members of the White House press corps who failed to show him "respect" by covering him in the way he wishes to be covered. Add. at 3. In addition, he threatened multiple government officials with the loss of their security clearances. *Id.* at 4-5.

Again, these are coercive threats. They unconstitutionally threaten the speech of willing speakers from whom Plaintiff receives information. And while actual chill to these speakers is not required for Plaintiff to show its own derivative right to receive speech has been violated, *see, e.g.*, *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002) ("[T]he right to hear and the right to speak are flip sides of the same coin."), it is frankly absurd for the President to suggest that his threats to revoke the security clearances of government employees or the press passes of White House reporters are not objectively chilling, or that they have not impaired Plaintiff's right to receive information from such speakers.

A government actor can use a threat (or retaliation) against one person to intimidate (or chill) others similarly situated. Calling out or "making an example" of one member of the White House press corps, or one former official holding a security clearance, can serve as a threat towards, and chill the speech of, all other reporters and former officials similarly situated, even if they themselves were not called out or threatened by name. *Cf., e.g.*, *Ragbir v. Homan*, 923 F.3d 53, 71 (2d Cir. 2019) (holding

that retaliatory conduct can "broadly chill protected speech" beyond just the specific victims of the retaliatory conduct). This is exactly how the President has behaved and how his threats operate. In this context, he made examples of individual members of the White House press corps and holders of specific security clearances, as well as the entire White House press corps as a class. The district court agreed. Add. at 16-17.

Plaintiff's organizational injury from this clear denial of its right to receive speech is not, as the President contends, a generalized injury shared by the public at large. Saying so is yet another attempt by the President to airbrush the complaint of its actual allegations, which, as the district court found, describe PEN America as an organization whose mission involves monitoring how the government interacts with the press, and which has a unique interest in hearing speech from White House correspondents and former government officials. Add. at 16-17. This is obviously not true of every member of the public.

III. The President does not have a right to selectively deny access to journalists based on their speech.

In his third question for interlocutory review, the President contends that Plaintiff's press corps claims fail to plausibly allege violations of the First Amendment because the President has the right to interact with some reporters more than others, based on his preferences regarding their coverage of him. This Court has held that claims based on the sufficiency of pleadings are generally inappropriate vehicles for interlocutory review, as "a reversal [on interlocutory appeal] at most could lead only to

a remand for repleading, with possibilities of further interlocutory appeals thereafter." *Gottesman v. General Motors Corp.*, 268 F.2d 194, 196 (2d Cir. 1959)*; see also In re Manhattan Inv. Fund Ltd. v. Bear, Stearns Sec. Corp.*, 288 B.R. 52, 56-57 (S.D.N.Y. 2002). However, even if such claims were appropriately reviewed at this stage, the President has once again misstated Plaintiff's allegations and the governing law.

The President declares, without citation to any authority, that "[o]ur constitutional structure requires the President be afforded broad, if not complete, discretion in determining how he interacts with the press." Pet. Br. at. 19. But this statement flatly contradicts the First Amendment, which explicitly prohibits any government official from suppressing protected speech or inhibiting freedom of the press, and further prohibits threats and retaliation aimed at doing so.

The President neither attempts to distinguish nor even cites this Court's precedent on this very issue. The Second Circuit Court of Appeals and the district courts herein have repeatedly held that "once there is a public function, public comment, and participation by some of the media, the First Amendment requires [the government to provide] equal access to all of the media." *Am. Broad. Companies, v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977); *Stevens v. N.Y. Racing Ass'n, Inc.*, 665 F. Supp. 164, 175 (E.D.N.Y. 1987) ("When some members of the press are given access to cover an event, the state cannot arbitrarily impose limits on other press representatives' access to the news."); *see also Nicholas v. Bratton*, 376 F. Supp. 3d 232, 259-260 (S.D.N.Y. 2019); *WPIX, Inc. v. League of Women Voters*, 595 F. Supp. 1484,

1489 (S.D.N.Y. 1984); *accord Huminski v. Corsones*, 396 F.3d 53, 84 (2d Cir. 2005). This line of cases forecloses Defendant's argument—which he tellingly rests on a decision from the Fourth Circuit Court of Appeals—that threatening to revoke, or revoking, a White House press pass on account of a reporter's viewpoint is consistent with the First Amendment.

The primary case on which the President relies—*Balt. Sun Co. v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006)—would not help him even if it were binding Second Circuit precedent. It is easily distinguishable on its facts from this case because the Governor's directive at issue in *Ehrlich* did not strip reporters of press passes or any other valuable government benefit; instead, it merely required officials not to speak with certain reporters. *Id.* at 413. Even then, the targeted reporters were never denied access to public press conferences. *Id.* at 414. On those facts, the Fourth Circuit held that there is no "actionable retaliation claim" against a "government official [who] denies a reporter access to discretionarily afforded information or refuses to answer questions," and that any infringement of a targeted reporter's First Amendment right in those circumstances is "*de minimis*." *Id.* at 418, 420.

IV. The President's argument on Plaintiff's security clearance claims is meritless.

In his fourth question for interlocutory review, the President contends that Plaintiff has failed to plausibly state a First Amendment violation based on the President's threats to revoke and directions to revoke security clearances. The

President's only argument here—that Plaintiff has failed to allege actual chill to any speaker (which is factually incorrect and misstates the law)—recasts his standing argument and should be rejected for the same reasons stated above.

CONCLUSION

In our constitutional democracy, few propositions are more clear than that no one—not even the President of the United States—is above the law, and that the government, including its most powerful individual actor, cannot restrict the press to censor and punish the content of their coverage of the President and his administration. When an Article III court is presented with plausible allegations that the President has threatened and retaliated against the press in violation of the First Amendment, that court has the authority to "say what the law is" and declare that the President's actions are wrong.

Because there is no substantial dispute on these core issues undergirding our system of government, the President's request for extraordinary interlocutory review of the district court's order on his motion to dismiss should be denied.

Respectfully submitted,

KRISTY PARKER (*pro hac vice*)
Counsel at The Protect Democracy Project Inc.
JOHN LANGFORD
Counsel at The Protect Democracy Project Inc.
LAURENCE M. SCHWARTZTOL
Counsel at The Protect Democracy Project Inc.
JUSTIN FLORENCE (*pro hac vice*)
ROBERT CORN-REVERE
RONALD G. LONDON
CHELSEA T. KELLY
DAVID A. SCHULZ

/s/ Kristy Parker
KRISTY PARKER
Counsel, The Protect Democracy Project Inc.
2020 Pennsylvania Avenue., NW, #163
Washington, DC 20006
Telephone: (202) 849-9307
Facsimile: (929) 777-8428
kristy.parker@protectdemocracy.org

October 23, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the word limit of Federal Rule of Appellate Procedure 5(c)(1) because the motion contains 5,131 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f).

I further certify that this motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word Version16 in a proportionally spaced typeface, 14-point Garamond font.

/s/ *Kristy Parker*
KRISTY PARKER

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October 2020, I caused true and accurate copies of the foregoing brief in opposition to petition for permission to appeal an interlocutory order of the united states district court for the Southern District of New York pursuant to 28 U.S.C. § 1292(b) to be served to counsel of record via the CM/ECF system

OCTOBER 23, 2020

/s/ *Kristy Parker*
KRISTY PARKER

ADDENDUM

TABLE OF CONTENTS

Protect Democracy

June 24, 2020

By ECF

The Honorable Lorna G. Schofield
United States District Judge
Southern District of New York
40 Foley Square
New York, NY 10007

Re: *PEN American v. Trump*, 18 Civ. 9433 (LGS)

Dear Judge Schofield:

Plaintiff writes pursuant to Rule III.C. of the Court's Individual Rules and Procedures for Civil Cases to request a pre-motion conference. As explained below, Plaintiff seeks leave to file a motion for partial summary judgment on its claims that the Defendant unlawfully threatened to take adverse actions against members of the White House press corps and media commentators who hold government security clearances in violation of the First Amendment.

I. Background

Following this Court's Order on Defendant's Motion to Dismiss and its Order of April 16, 2020, the parties have discussed whether this case could be resolved on a motion for summary judgment based on stipulated facts. During the course of those negotiations, counsel for Defendant has declined to enter into any "motive" stipulations consistent with Plaintiff's well-pled allegations that Defendant retaliated against certain journalists and media commentators because of their protected speech. Accordingly, Plaintiff cannot proceed to summary judgment based on stipulated facts on its retaliation claims without the opportunity for discovery into Defendant's reasons for his actions. Defendant has, however, insisted that no discovery of any kind is appropriate in this case.

For the reasons stated below, Plaintiff can advance this case towards resolution by filing a motion for partial summary judgment on its unconstitutional threats claims at this time. These claims do not require proof of Defendant's motive and depend only on statements made and actions taken by Defendant that are in the public domain and cannot reasonably be disputed.

II. The Court Should Permit Plaintiff to file a Motion for Partial Summary Judgment on Its Threats Claims

As this Court noted in its Order on Defendant's Motion to Dismiss, two categories of claims involving two categories of press actors remain to be decided: threats and retaliatory acts against members of the White House press corps, and threats and retaliatory acts against media commentators who hold federal government security clearances. The legal standard for proving a

The Protect Democracy Project
2020 Pennsylvania Ave NW #163
Washington, DC 20006

threats claim is an objective one, requiring Plaintiff to show that "the comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request." *Hammerhead v. Breznoff*, 707 F.2d 33, 39 (2d Cir. 1983). Plaintiff is not required to show that the threats succeeded in actually chilling speech in order to prevail on its claim. *See, e.g.*, *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015) (an unconstitutional threat "is actionable * * * even if it turns out to be empty—the victim ignores it, and the threatener folds his tent"); *see also Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003).

Under this standard, Plaintiff is entitled to judgment as a matter of law in its favor on its claims that Defendant threatened to revoke White House press passes because of his dislike of the content of certain reporters' coverage, and that he threatened to revoke the security clearances of certain media commentators because he disliked what those commentators said about him and his administration.

The Court should permit Plaintiff to file this motion now rather than waiting until the close of discovery for two reasons. First, Defendant's presidency is not certain to continue past January 20, 2021, and it is important for the Court to reach the merits of this claim. A ruling on the constitutional limits of presidential authority to threaten members of the press with official sanctions is important not just for this administration, but for those yet to come. *See* Amended Compl. ¶ 13. Second, and relatedly, Defendant has foreshadowed his intention to resist discovery at every turn. While Plaintiff disagrees that Defendant is above the law and immune from discovery on claims that he abused his power by threatening and retaliating against the press, litigating discovery disputes will take time. Resolving a portion of the case as quickly as possible will serve the interests of justice and will further narrow the issues for the remainder of the litigation.

For these reasons, Plaintiff respectfully requests that the Court grant Plaintiff leave to file a motion for partial summary judgment on its unconstitutional threats claims. Plaintiff proposes that the Court enter a briefing schedule consistent with S.D.N.Y. Local Civil Rule 6.1(b).

Respectfully submitted,

By: /s/ *Kristy Parker*

Kristy Parker
THE PROTECT DEMOCRACY PROJECT, INC.
2020 Pennsylvania Avenue, NW, #163
Washington, DC 20006
Phone: (202) 579-4582
kristy.parker@protectdemocracy.org

Cc (by ECF): Counsel of Record

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

July 2, 2020

By ECF
The Honorable Lorna G. Schofield
United States District Judge
40 Foley Square
New York, NY 10007

Re: *PEN American v. Trump*, 18 Civ. 9433 (LGS)

Dear Judge Schofield:

This Office represents defendant President Donald J. Trump in this First Amendment action brought by plaintiff PEN American Center, Inc. ("PEN American"). I write respectfully to respond to plaintiff's June 24, 2020, letter seeking leave to file a motion for partial summary judgment on plaintiff's threats claims. *See* ECF No. 102. The Court should deny plaintiff's request as premature because there are significant factual issues requiring further development, including the degree to which any allegedly threatened individual's speech has been reduced and the extent to which any such reduction has impaired plaintiff's organizational mission.

I. Background

Plaintiff, on behalf of itself and its members, brought this suit against the President in his official capacity, alleging that the President violated the First Amendment by suppressing media free speech through threats and retaliation. On March 24, 2020, the Court granted in part and denied in part the President's motion to dismiss. *See* March 24, 2020, Opinion and Order, ECF No. 76 (the "March 24 Opinion"). The Court concluded, *inter alia*, that plaintiff had organizational standing to proceed because plaintiff had allegedly received less speech from the White House press corps and six former government officials as a result of alleged threats and retaliation by the President. *Id.* at 15-17. The Court also concluded that plaintiff had associational standing because plaintiff's member Jim Acosta had allegedly been chilled and had allegedly received less speech from his White Press corps colleagues. *Id*. at 11.[1]

On April 16, 2020, the Court stayed discovery and directed the parties to negotiate on whether plaintiff's claims could be resolved on cross-motions for summary judgment on stipulated facts, or through a negotiated settlement. *See* April 16, 2020, Order, ECF No. 84. On May 5, following initial discussions, plaintiff provided the President with written proposed stipulations. On May 18, following an interim discussion, government counsel provided plaintiff with a written counter-proposal. On May 27, 2020, the Court granted the President leave to file a motion to certify and stay discovery, with oral argument set for July 9, 2020. *See* Order dated

[1] The President respectfully disagrees with the Court's conclusion that plaintiff's Amended Complaint adequately alleges that the speech of Mr. Acosta, the White House press corps and six former government officials has actually and plausibly been chilled by the President's actions.

May 27, 2020, ECF No. 95. On June 17, 2020, in response to a request from plaintiff's counsel, government counsel provided plaintiff's counsel with additional proposed stipulations. On June 24, 2020, plaintiff's counsel informed government counsel that plaintiff would not accept the President's proposed stipulations and submitted its present request to the Court for leave to file a motion for partial summary judgment on plaintiff's claims that the President has threatened members of the White House press corps and former government officials. *See* ECF No. 102.

II. The Court Should Deny Plaintiff's Request as Premature

The Court should deny plaintiff's present request as premature because there are significant factual issues in dispute that require further development, including in connection with plaintiff's threats claims.[2] Plaintiff's statements that "[plaintiff's threats] claims . . . depend only on statements made and actions taken by Defendant that are in the public domain and cannot reasonably be disputed" and that it is "not required to show that the threats succeeded in actually chilling speech in order to prevail on its claim" are incorrect. ECF No. 102 at 1, 2. Plaintiff continues to bear the burden of showing that it was actually injured:

> [t]he party invoking federal jurisdiction bears the burden of establishing [the elements of standing, including injury-in-fact]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, . . . [At the summary judgment stage,] . . . the plaintiff can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts . . . .

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (citations and quotation marks omitted). The Court's March 24, 2020, Opinion and Order, identified the injury-in-fact supporting plaintiff's standing to bring its claims, including its threats claims, as flowing from the allegedly diminished speech of Mr. Acosta, members of the White House Press Corps, and the six former government officials identified in plaintiff's Amended Complaint. Based on publicly available statements and publications, the President believes he has a strong factual basis to dispute that the speech of Mr. Acosta, members of the White House Press Corps, or the six former government officials has been adequately chilled to support plaintiff's standing. For example, it is highly questionable that Mr. Acosta has been chilled at all or that any possible diminution in his speech could have affected plaintiff. It is the government's understanding that Mr. Acosta is frequently present at the White House, and to the extent recently he has been present less frequently, this has been due to the COVID-19 pandemic. As one example of Mr. Acosta's recent reporting, publicly available video from the Cable News Network shows Mr. Acosta reporting on the White House and questioning the President during the COVID-19 pandemic. *See* "Acosta Presses Trump on his predictions of COVID-19 cases," April 28, 2020,

---

[2] The President has made good-faith efforts to resolve this case on cross-motions for summary judgment on stipulated facts and is prepared to continue to do so. However, if plaintiff will not into enter cross-motions on stipulated facts resolving the case without discovery, it will be necessary for the President to take discovery on plaintiff's claims.

cnn.com/videos/politics/2020/04/28/trump-response-to-coronavirus-cases-acosta-pkg-tsr-vpx.cnn. As another example separate from Mr. Acosta, the New York Times recently reported that former government official James Comey's book "A Higher Loyalty: Truth, Lies, and Leadership" has been adapted into a television miniseries, which Mr. Comey has publicly supported airing before the upcoming election. *See* "In Reversal, Trump-Comey Miniseries Will Now Air Before Election Day," June 24, 2020, *available at* https://www.nytimes.com/2020/06/24/business/media/trump-comey-mini-series.html.

To prevail on summary judgment, plaintiff would need to show that it is beyond factual dispute that the speech of individuals such as Mr. Acosta and Mr. Comey has been chilled and, except for Mr. Acosta, that their speech has been so chilled as to harm plaintiff's organizational mission. In light of the apparently vigorous public speech of relevant third parties, including about the government and the President, the President should be given the opportunity to take discovery on these points, including discovery on plaintiff's organizational mission and in what ways it may have been harmed by any claimed reduction in speech.

In addition, although the President intends to take the position that the statements at issue were not threats as a matter of law, the President may argue in the alternative that, as a factual matter, members of the White House press corps and the six former government officials did not interpret the statements at issue as threats. The President should be given the opportunity to develop the factual record on this point before opposing any summary judgment motion, including so that the Court is not burdened by multiple rounds of summary judgment briefing.

We thank the Court for its consideration of this submission.

Respectfully submitted,
AUDREY STRAUSS
Acting United States Attorney

By: */s/ Steven J. Kochevar*

Steven J. Kochevar
Assistant United States Attorney
86 Chambers Street, Third Floor
New York, NY 10007
Telephone: (212) 637-2715
Fax: (212) 637-2717
Email: steven.kochevar@usdoj.gov

Cc (By ECF): Counsel of Record