UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. DONALD J. TRUMP, *Defendant*.	Case No. 23-cr-257-TSC

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION & THE AMERICAN CIVIL LIBERTIES UNION OF THE DISTRICT OF COLUMBIA IN AID OF THE COURT'S RE-EVALUATION OF ITS GAG ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit organization that since 1920 has sought to protect the civil liberties of all Americans. The ACLU of the District of Columbia is the ACLU's Washington, D.C. affiliate. Amici have frequently appeared in this Court, as counsel and amici, in cases raising significant questions about the meaning of the Constitution, its limitations on government power, and the breadth of rights it grants. Amici have also participated in many of the most consequential First Amendment cases in American history, including the 1966 Supreme Court case upon which the Court based its authority to issue its October 17 gag order. *See* Brief for ACLU & Ohio Civil Liberties Union as Amici Curiae at 2, *Sheppard v. Maxwell*, No. 490 (U.S. Jan. 24, 1966), 1966 WL 100499. Amici seek leave to file the instant brief pursuant to D.D.C. LCvR 7(o)(1).

ARGUMENT

Former President, and now Defendant, Donald Trump has said many things. Much that he has said has been patently false and has caused great harm to countless individuals, as well as to the Republic itself. Some of his words and actions have led him to this criminal indictment, which alleges grave wrongdoing in contempt of the peaceful transition of power. But Trump retains a First Amendment right to speak, and the rest of us retain a right to hear what he has to say. Thus, any restraint this Court imposes on Defendant's future speech must be precisely defined and narrowly tailored to protect the impartial administration of justice. Respectfully, the Court's October 17 gag order fails that test, and Amici urge the Court to re-evaluate it.

[1] Pursuant to Local Civil Rule 7(o)(5), counsel for Amici Curiae certifies that no counsel for a party authored this brief in whole or in part, and no person other than Amici Curiae, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

I. The Order's use of the word "target" is unconstitutionally vague.

In its order, the Court barred Defendant from "making any public statements, or directing others to make any public statements, that target (1) the Special Counsel prosecuting this case or his staff; (2) defense counsel or their staff; (3) any of this court's staff or other supporting personnel; or (4) any reasonably foreseeable witness or the substance of their testimony." Order at 3 (ECF 105). The entire order hinges on the meaning of the word "target." But that meaning is ambiguous, and fails to provide the fair warning that the Constitution demands, especially when, as here, it concerns a prior restraint on speech.[2]

The vagueness doctrine, rooted in due process, ordinarily applies to legislatures, requiring that statutes provide "fair notice or warning" of what is prohibited by penal laws. *Smith v. Goguen*, 415 U.S. 566, 572 (1974). But it also applies to court orders that carry with them the threat of punishment. *See, e.g.*, *Int'l Longshoremen's Ass'n, Loc. 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967); *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974); *English v. Cunningham*, 269 F.2d 517, 524–25 (D.C. Cir. 1959). Fairness demands that the law, and judicial edicts, avoid laying "trap[s]" for "the innocent," and instead "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

The vagueness doctrine has special force where, as here, government action restricts speech, because "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful

[2] The gag order restrains both the Defendant and his counsel. Amici focus on the rights of the Defendant here, in part because he is running for President, and because attorneys can be restrained as officers of the court in ways that non-lawyers cannot. *See infra* Part II.A. But Amici's concerns about vagueness extend to all who are required to comply with the order.

zone than if the boundaries of the forbidden areas were clearly marked.'" *Grayned*, 408 U.S. at 109 (cleaned up) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). The First Amendment rights of the accused require any court order restraining their speech to be both clearly defined and narrowly framed. The order's prohibition on speech that "targets" certain named and unnamed individuals is neither.

Reading the order, Defendant cannot possibly know what he is permitted to say, and what he is not. "Target" is an inherently vague term. It can mean "to make an object of ridicule or criticism," or even to "affect[]" someone "by an action." *Target*, Merriam-Webster Dictionary (Online ed.), https://www.merriam-webster.com/dictionary/target. In the context of the order, it could mean something as innocuous as "name" or "identify," or something much more violent. One could target another with respectful but vigorous political advocacy, or target them for physical violence or death. Context can sometimes provide clarity, *see In re Levine*, 27 F.3d 594, 596 (D.C. Cir. 1994), but the October 17 order gives none. It does not define "target" to be narrowly limited to its most menacing implications, perhaps prohibiting true threats or incitement of violence against witnesses or court staff. Nor does it give examples to guide Defendant's behavior and the public's expectations.

One of the categories that cannot be "target[ed]" is "the substance of" the "testimony" of "any reasonably foreseeable witness," an unknown and perhaps unknowable range of possible topics. Order at 3. The meaning of "target" is even less clear in this application. While it might mean "affect or influence" the substance of such testimony, it might simply encompass merely "addressing" the testimony in general. Defendant cannot know which of these meanings applies, and as a result the order risks restricting too much speech.

Should the Court continue to believe that a gag order is necessary in this case, the Court should rephrase its order or clarify its meaning.

II. Any restraint on Defendant's speech must be narrowly tailored to prohibit imminent threats against individuals or conduct that would interfere with the administration of justice.

The October 17 order suffers from a second flaw: In addition to being impermissibly vague, it is impermissibly broad. Commendably, this Court applied a high First Amendment standard in assessing the need for the order. Order at 2 (finding the potential for extrajudicial statements by both the parties and their counsel "pose a significant and immediate risk" of prejudice). Unfortunately, the order fails to adhere to that standard with sufficient rigor, and consequently bans too much speech—without a sufficient explanation of how the First Amendment standard has been met in this case.

A. The First Amendment standard is strict.

The heavy presumption of unconstitutionality that attaches to prior restraints "form[s] the backdrop against which" courts must measure their own restrictions on speech in connection with the judicial process. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561–62 (1976); *see Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). *Nebraska Press* involved a judicial order restricting the media from publishing accounts about certain evidence that was yet to be used in a prominent murder trial taking place in a small, rural community. 427 U.S. at 567–68. The Court articulated three considerations relevant to whether a restraint on speech in connection with a judicial proceeding can survive First Amendment scrutiny: (1) whether the expected publicity about the case would harm the defendant's right to a fair trial; (2) whether the gag order is the least restrictive means possible to ensure that fairness; and (3) whether the gag order will be effective in preventing the potential unfairness. *See id.* at 562–63.

At the same time, courts not only have the power, but the duty, to "protect their processes from prejudicial outside interferences" and to ensure a fair trial. *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966). Long before *Sheppard*, Justice Frankfurter warned of the potential for "trial by newspaper" to "t[ear]" participants "from their moorings of impartiality by the undertow of extraneous influence." *Pennekamp v. Florida*, 328 U.S. 331, 359, 366 (1946) (Frankfurter, J., concurring). At bottom, "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges v. California*, 314 U.S. 252, 271 (1941).

"The point at which free speech and fair trials intersect in the administration of criminal justice presents serious and complex problems to those," like Amici, "who would defend the principles of both freedom and justice."[3] *Nebraska Press* involved a gag on the media, rather than a criminal defendant, and over the past half century, courts have disagreed about whether its most demanding requirements apply in the same way to participants in proceedings before the court. Neither the Supreme Court nor the D.C. Circuit has resolved that question.

Some courts have concluded that the First Amendment applies with full force to restrictions on the speech of participants in the judicial process. Even a year before *Nebraska Press*, the Seventh Circuit struck down local court and American Bar Association "no comment" rules proscribing extrajudicial comments by attorneys on pending litigation because they did not narrowly prohibit only "comments that pose a 'serious and imminent threat' of interference with the fair administration of justice." *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975). Similarly, the Ninth Circuit has endorsed "a general rule" that "speech concerning judicial proceedings may be restricted only if it 'is directed to inciting or producing' a threat to the

[3] Brief for ACLU & Ohio Civil Liberties Union as Amici Curiae at 2, *Sheppard v. Maxwell*, No. 490 (U.S. Jan. 24, 1966), 1966 WL 100499.

administration of justice that is both 'imminent' and 'likely' to materialize." *Turney v. Pugh*, 400 F.3d 1197, 1202 (9th Cir. 2005) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)); s*ee also Levine v. U.S. Dist. Ct. for C.D. Cal.*, 764 F.2d 590, 596–97 (9th Cir. 1985). And—in a case with unique resonance to this one—the Sixth Circuit held that the "clear and present danger" test applied to a gag order restricting the speech of Congressman Harold Ford, a criminal defendant charged with mail and bank fraud. *United States v. Ford*, 830 F.2d 596, 599 (6th Cir. 1987).

Other courts have applied less demanding standards when evaluating gag orders of courtroom participants. Some have required banned speech to have a "reasonable likelihood" of impairing the administration of justice. *See, e.g.*, *In re Russell*, 726 F.2d 1007, 1010 (4th Cir. 1984); *United States v. Tijerina*, 412 F.2d 661, 666–67 (10th Cir. 1969). Using slightly different terms, the Fifth Circuit allows a court to restrict the speech of parties and their lawyers "if it determines that extrajudicial commentary by those individuals would present a 'substantial likelihood' of prejudicing the court's ability to conduct a fair trial." *United States v. Brown*, 218 F.3d 415, 427 (5th Cir. 2000). That is essentially the standard the government urged the Court to adopt here, pointing to a handful of similar orders it has obtained on that basis from other courts in this District. *See* Gov't Reply at 5 (ECF 64). The government also suggested, without elaboration, that a lower standard was appropriate in criminal cases than in civil ones. *See id.* at 6–7.

The stricter view from the Sixth, Seventh, and Ninth Circuits is the correct one when it comes to issuing a gag order against criminal defendants. In adopting the lower "substantial likelihood" standard, the Fifth Circuit relied heavily on—but misinterpreted—the Supreme Court's opinion in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). In *Gentile*, in an opinion by Justice Kennedy, the Court voided on vagueness grounds a state bar disciplinary rule restricting

attorneys' out-of-court speech on pending matters. *See id.* at 1048 (opinion of Kennedy, J.). Justice O'Connor signed onto that opinion, providing the fifth vote. But she also gave a fifth vote to an opinion by Chief Justice Rehnquist that explicitly approved, as consistent with the First Amendment, the state bar rule's standard, which permitted punishment where extrajudicial speech posed a "substantial likelihood of material prejudice" to the administration of justice. *Id.* at 1075 (opinion of Rehnquist, C.J.).

Justice Kennedy protested that the "substantial likelihood" standard, though endorsed by a Court majority, was both unnecessary and unwise. *See id.* at 1051 (Kennedy, J., concurring). Even so, in *Brown*, the Fifth Circuit adopted the lower standard, and applied it not only to gag orders affecting *attorneys* before a court, but *all other participants*, too. 218 F.3d at 423. That was unjustified. While Chief Justice Rehnquist's opinion used some stray language that appeared to suggest his views might reach beyond attorneys, *Gentile* involved restrictions on the speech only of attorneys, who are officers of the court.[4] His opinion relied heavily on "the history of the regulation of the practice of law by the courts." 501 U.S. at 1066, 1066–68. And the question before the Court did not have anything to do with non-lawyers. *See id.* at 1072 n.5. Moreover, Justice O'Connor, who provided the fifth vote, wrote a concurrence explaining that her view was merely that "a State may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the press." *Id.* at 1082 (O'Connor, J., concurring). So in applying

[4] Like Chief Justice Rehnquist in *Gentile*, the government cites a footnote in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 n.18 (1984), that suggests the rights of litigants "may be subordinated to other interests that arise in" the courtroom. *See* Gov't Reply at 5; *Gentile*, 501 U.S. at 1073. But that case involved a very different order, restricting the dissemination by a defendant (which happened to be a newspaper) of documents produced in discovery, *Seattle Times*, 467 U.S. at 36, that was "not the kind of classic prior restraint that requires exacting First Amendment scrutiny," *id.* at 33.

Gentile to parties, rather than just attorneys, *Brown* overreached—as does the government in urging that relaxed standard for restricting Defendant's speech rights here.[5]

The obvious and unprecedented public interest in this prosecution, as well as the widespread political speech that it has generated and will continue to generate, only underscores the need to apply the most stringent First Amendment standard to a restraint on Defendant's speech rights. Speech on matters of public concern "is at the heart of the First Amendment's protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (cleaned up). There has been extensive public commentary by parties and non-parties alike about Defendant, this case, and the events that underlie it. And Defendant's ability to speak publicly about the substance of the prosecution, even including potential witnesses and testimony, is in many ways inextricable from the 2024 presidential campaign in which he is a declared candidate. Defendant's role in the events related

[5] The government is just wrong when it represents that *Gentile* "forecloses the applicability of the clear-and-present-danger standard" adopted in *Ford* "to the regulation of speech by trial participants." Gov't Reply at 6 (quoting *Brown*, 218 F.3d at 427) (cleaned up). It may have foreclosed that standard as applied to attorneys, but not to *all* trial participants. *See Nelle ex rel. B.N. v. Huntsville Sch. Dist.*, No. 5:21-CV-05158, 2021 WL 6135690, at *3 n.2 (W.D. Ark. Dec. 29, 2021) (rejecting *Brown*'s extension of *Gentile* to non-attorneys); *United States v. Schock*, No. 16-cr-30061, 2016 WL 7176578, at *1–2 (C.D. Ill. Dec. 9, 2016) (rejecting, notwithstanding *Gentile*, government's motion for a gag order of parties, and applying the "serious and imminent threat to the administration of justice" standard); *see also, e.g.*, *United States v. Carmichael*, 326 F. Supp. 2d 1267, 1294 (M.D. Ala. 2004) (Thompson, J.) (concluding that the "clear and present danger" standard should apply to a criminal defendant); *United States v. McGregor*, 838 F. Supp. 2d 1256, 1260-62 (M.D. Ala. 2012) (Thompson, J.) (reaffirming *Carmichael* after *Gentile* and distinguishing gag orders that affect defendants from those that affect attorneys).

The government also pointed to two post-*Ford* cases in district courts within the Sixth Circuit that "have recognized that *Gentile*, rather than *Ford*, supplies the applicable standard." Gov't Reply at 6. To the extent they repeat *Brown*'s error, those cases were wrong, but the government vastly overstates their significance even on their own terms. One of them concerned a "gag" on sealed and classified information, a context far removed from this one. *United States v. Koubriti*, 307 F. Supp. 2d 891, 901–02 (E.D. Mich. 2004). In the other, the defendant conceded the lower standard applied. *United States v. Fieger*, No. 07-20414, 2008 WL 474084, at *4 (E.D. Mich. Feb. 19, 2008), *report and recommendation adopted as modified*, No. 07-CR-20414, 2008 WL 659767 (E.D. Mich. Mar. 11, 2008).

to his obstruction of the peaceful transition of power are relevant not only to the proceedings in this Court, but to the country's decision about whether he deserves to be elected again.

Similar issues were present in *Ford*, where the Sixth Circuit overturned a gag order that prohibited speech by the defendant, a sitting congressman, about the evidence and facts in the case, the prosecuting attorney, the government's motive in prosecuting him, and the ultimate merits of the prosecution. 830 F.2d at 597. In striking down the gag order under the "clear and present danger" test, the court explained that the defendant was "entitled to attack the alleged political motives of the Republican administration which he claims is persecuting him because of his political views . . . ." *Id.* at 600–01. It also underscored the defendant's "right to express his outrage," and "to fight the obvious damage to his political reputation in the press and in the court of public opinion." *Id.* at 601. The court noted specifically that the gag order would leave him "unable to respond" to political "opponents" who "attack him as an indicted felon," or to "inform his constituents of his point of view." *Id.*[6]

To be sure, the government and the public have a strong "interest that justice be done in a controversy between the government and individuals," and in ensuring a fair trial. *Tijerina*, 412 F.2d at 666 (citing *Wade v. Hunter*, 336 U.S. 684, 689 (1949)); *see also United States v. Locascio*, 6 F.3d 924, 931 (2d Cir. 1993) (discussing the government's interests in ensuring a just verdict and a fair trial). But as the court explained in *Ford*, "permitting an indicted defendant . . . to defend himself publicly may result in overall publicity that is somewhat more favorable to the defendant than would occur when all participants are silenced," but would "not result in an 'unfair' trial for

[6] While *Ford* involved a sitting congressman who was not actively running for anything, the court found it important to note that he would "soon be up for reelection." 830 F.3d at 601. And even in *Brown*, the district court temporarily lifted its own gag order for two months "to avoid interfering with [the defendant's] re-election campaign for Insurance Commissioner." 218 F.3d at 419 (upholding the reinstated gag order on the lower standard discussed above).

the government." 830 F.2d at 600. A trial is not unfair simply because the defendant has been able to speak about it in public. Additionally, as *Ford* emphasized, the Supreme Court's conclusion that widespread public broadcasts of a defendant's confession created an unfair trial in *Sheppard* was premised on the *defendant*'s right to a fair trial under the Sixth Amendment, a right the government does not have. *Id.* As a result, "[t]o the extent that publicity is a disadvantage for the government, the government must tolerate it." *Id.*

B. The October 17 order is overbroad and underexplained.

The court in *Ford* struck down an extraordinarily far-ranging gag order, much broader than the October 17 order at issue here. But the order in this case nonetheless fails to justify the speech restrictions it has imposition on Defendant, or to narrow that restriction as much as possible. The Court could fix that in several ways.

First, the order's prohibition of "target[ing] . . . any reasonably foreseeable witness or the substance of their testimony" effectively bars the Defendant from addressing whole subjects of discussion. Order at 3. But witness testimony in this case will concern the events of January 6, 2021, the results of the 2020 presidential election, and Defendant's own conduct in relation to both. These topics are key points in the ongoing 2024 presidential campaign. Barring any discussion of these entire topics by Defendant is unconstitutionally overbroad. And to justify even a much narrower restriction along these lines, the Court must find that such discussion would actually harm the fairness of the trial. Where so many are already saying so much about the topic, it seems unlikely that silencing the Defendant is justified. In any event, the order does not support that conclusion.

Second, the order applies to speech that "targets" the Special Counsel and its staff. Order at 3. But like the Court itself, which is excluded from the order's terms, the Special Counsel is a

public official. Attempts to gag speech that addresses how the Special Counsel is conducting his work, on the grounds of ensuring the proper and impartial administration of justice, unduly undermine public discussion on matters of public concern that is at the heart of what the First Amendment protects. Respectfully, the Court should exempt public officials from the coverage of its order, except to the extent that it bars speech that threatens or instigates violence against such persons.

Third, a key step in the Court's brief analysis supporting its order was its reliance on "[u]ndisputed testimony" that Trump's public statements about "individuals, including on matters related to this case," has led to other people "threaten[ing] and harass[ing]" "potential witnesses, prosecutors, and court staff." Order at 2. The government's motion asked the Court to go even further, urging the adoption of a broad gag order—one that would even have prohibited mere "disparage[ment]," Gov't Mot. at 15 (ECF 57)—premised on Defendant's "know[ledge] that when he publicly attacks individuals and institutions, he inspires others to perpetrate threats and harassment against his targets." Gov't Mot. at 3. Amici acknowledge the risk that Defendant, who exercises substantial authority over his followers, could inspire others to engage in violence, and share concerns about his apparent willingness to do so. But the First Amendment does not authorize the Court to impose a judicial gag order on Defendant merely because third parties who hear his public statements may behave badly of their own accord. Of course, where advocacy crosses the line into incitement,[7] or where public speech amounts to a true threat or criminal solicitation,[8] it is unprotected by the First Amendment. If the Court were to find that there is a serious threat that Defendant will engage in those kinds of statements, it might justify a restraint

[7] *See Brandenburg*, 395 U.S. at 447.

[8] *See, e.g.*, *United States v. Hansen*, 599 U.S. 762, 771 (2023).

directed to such speech, but it must sufficiently explain those conclusions and their evidentiary basis before doing so.[9] The mere fact that others have threatened actions against trial participants after hearing Defendant's words is not enough.

Finally, it is unclear that an order limiting the Defendant's speech is necessary to serve the administration of justice more broadly, beyond the narrow albeit serious concern of threats to participants in the trial. *See Nebraska Press*, 427 U.S. at 569, 553–54. This case is already one of the most talked-about trials of all time. There may never have been a better-known criminal case in American history, or a better-known defendant. With that in mind, to the extent that the Court's order seeks to prevent future statements from affecting the impartiality of the potential jury pool, the order seems unlikely to make much of a difference. Where, as here, an order restricts a citizen's ability to speak out on matters of public concern, in the midst of an election campaign in which his words may inform the result of the presidential election, more is required than a generalized concern about further publicity about what is already one of the most public trials in the history of our nation.

CONCLUSION

With respect, the October 17 order fails the First Amendment, and Amici urge the Court to re-evaluate any court-imposed restrictions of Defendant's speech.

[9] While the Court made a finding that Defendant's past statements "us[ed] language communicating . . . that particular individuals involved" in his prosecution "deserve death," Order at 2, the public record does not appear to reflect such language. The government's motion does refer to death threats made by other people against the Court and two Georgia elected officials, but not made by Defendant himself. *See* Gov't Mot. at 4, 5, 12.

DATE: October 25, 2023

Respectfully submitted,

/s/ Brett Max Kaufman

Brett Max Kaufman (D.C. Bar No. NY0224)
Ben Wizner
Brian Hauss
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
212.549.2500
bkaufman@aclu.org

Scott Michelman (D.C. Bar No. 1006945)
Arthur B. Spitzer (D.C. Bar No. 235960)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF THE DISTRICT OF COLUMBIA
915 15th Street, NW, Second Floor
Washington, D.C. 20005
202.457.0800
smichelman@acludc.org

David Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005
212.549.2611
dcole@aclu.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief Amici Curiae of the American Civil Liberties Union & the American Civil Liberties Union of the District of Columbia in Aid of the Court's Re-evaluation of its Gag Order complies with the typeface and type-style requirements set forth in D.D.C. LCvR 1.1(d), because it has been prepared in 12-point, Times New Roman font; as well as with the type-volume limitation set forth in D.D.C. LCvR 7(o)(3), because its length does not exceed twenty-five pages.

DATE: October 25, 2023

Respectfully submitted,

/s/ Brett Max Kaufman
Brett Max Kaufman (D.C. Bar No. NY0224)

Counsel for Amici Curiae