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

In the Matter of the Application of:

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

Petitioners,

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

v.

THE HONORABLE ARTHUR F. ENGORON, J.S.C., and PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York,

Respondents.

No. 2023-05859

Supreme Court
New York County
Index No. 452564/2022

AFFIRMATION IN OPPOSITION TO MOTION FOR A STAY

DENNIS FAN, an attorney admitted to practice law in the State of New York, who is not a party to this action, under penalty of perjury affirms as follows:

1. I am a Senior Assistant Solicitor General in the Office of Letitia James, Attorney General of the State of New York (OAG), the plaintiff in the underlying Executive Law § 63(12) enforcement action from which this C.P.L.R. article 78 petition arose. The petition seeks a writ of prohibition against respondents the Honorable Arthur F. Engoron—the justice of Supreme Court, New York County, who is presiding over the ongoing trial in the Executive Law § 63(12) action brought by OAG against petitioners—and OAG. I submit this affirmation in opposition to the motion by petitioners—entities operating as the Trump Organization and certain executives of the Trump Organization—for a stay of four orders of Supreme Court, dated October 3, 20, 26, and November 3, 2023, while this Court resolves their petition challenging those orders. I am familiar

with the facts and circumstances of this matter based upon my review of the relevant orders and decisions rendered and submissions filed by the parties in this action, and through communications with other OAG attorneys.

2. Supreme Court issued the four orders challenged here to protect the safety of the court's staff and to ensure the orderly progression of trial proceedings. The court issued the orders in response to the extraordinary and dangerous personal attacks made against the court's staff by both petitioner Donald J. Trump and petitioners' counsel during the ongoing trial. Specifically, petitioners and their counsel repeatedly made baseless, highly inappropriate, and personally identifying attacks against the court's principal law clerk. Despite multiple warnings from the court, those attacks continued.

3. Supreme Court's October 3 and November 3 orders properly prohibited petitioners and their counsel, respectively, from continuing to target the court's staff. The court issued its October 3 order, which prohibits the parties from publicly commenting about the court's staff, after Mr. Trump's posted on social media and emailed to millions of recipients a personally identifying and disparaging comment about the court's principal law clerk. The court issued its November 3 order, which prohibits the parties' counsel from commenting on the principal law clerk's communications with the court, after petitioners' counsel refused to stop repeating unprofessional and vexatious arguments about the fact that the principal law clerk communicates with and advises the court—which is a significant part of her job. Each of these orders properly imposed exceedingly limited restraints on speech to protect the safety of the court's staff and preserve the orderly administration of the trial. Accordingly, petitioners' free-speech arguments are meritless and the equities tip decisively against a stay. As courts have repeatedly made clear, neither litigants nor their counsel have an unfettered right to say whatever they want in the context of an ongoing

trial. Rather, trial courts may impose reasonable limits on trial participants to further important interests such as protecting court safety and preserving the orderly administration of trial proceedings. Otherwise, any trial could be derailed by ad hominem attacks against witnesses, staff, opposing counsel, or other participants.

4. Supreme Court's October 20 and 26 orders properly sanctioned Mr. Trump $5,000 and $10,000, respectively, for violating the court's October 3 order. The court issued its October 20 order after Mr. Trump continued to publish on his presidential campaign's website the derogatory post about the court's principal law clerk, despite the court's order prohibiting such statements. The court issued its October 26 order after Mr. Trump made another inappropriate comment about the principal law clerk, accusing her of being a partisan actor at trial, to reporters located immediately outside the courtroom. The Court should deny petitioners' motion to stay enforcement of these two orders because Mr. Trump has already paid the monetary sanctions and the motion is thus moot. Moreover, there will be no irreparable harm to Mr. Trump absent a stay because he will get the monetary amounts back if he ultimately prevails in the underlying petition. Finally, petitioners' arguments about contempt fail because the court did not hold Mr. Trump in contempt. Rather, the court properly imposed sanctions for frivolous conduct under the Rules of the Chief Administrator (22 N.Y.C.R.R.) § 130-1.1 and the court's inherent authority. Specifically, "frivolous conduct" is defined for this purpose as, inter alia, conduct "undertaken primarily . . . to harass or maliciously injure another." Rules of the Chief Administrator § 130-1.1(c)(2).

5. A single justice of this Court issued an interim stay of Supreme Court's four orders pending this Court's resolution of petitioners' full stay motion. The return date for that motion is November 27. OAG urges the Court to deny the motion as soon as possible, and prior to the completion of trial, which will conclude on or around December 8 (absent rebuttal witnesses).

A speedy denial is necessary to ensure the safety of Supreme Court's staff and the integrity and the orderly administration of the proceedings through the end of the trial.

BACKGROUND

6. In September 2022, OAG brought an action in Supreme Court against petitioners pursuant to Executive Law § 63(12), alleging that they engaged in repeated and persistent fraud and illegality in the carrying on, conducting, or transaction of their business in New York. *See* Ex. A, Verified Compl., ¶¶ 1-8 (Sept. 21, 2022).[1] A bench trial in that action has been ongoing since October 2, 2023. OAG completed its case in chief on November 8, and petitioners are currently presenting their case in chief. *See* Ex. F, Nov. 8 Tr. at 3842-44. The trial remains ongoing, and petitioners have indicated that they will conclude their case in chief on or around December 8.

7. The high-profile nature of this trial has required extensive security preparations by Supreme Court, the Office of Court Administration, the parties, and counsel. Since the start of trial, the court has been "inundated with hundreds of harassing and threat[en]ing phone calls, voicemails, emails, letters, and packages." Ex. J, Nov. 3 Order at 2. The court issued the challenged orders to protect the safety of its staff (approximately three staff members) during the trial and to ensure the orderly administration of trial. *See* Ex. F, Oct. 26 Tr. at 2479; *id.*, Nov. 2 Tr. at 3396.

[1] Lettered exhibits refer to exhibits to defendants' petition. Numbered exhibits refer to exhibits to this affirmation.

A. Supreme Court Issues Its October 3 Order Against Petitioner Donald J. Trump and Other Petitioners to Protect the Court's Staff

8. From the October 2 start of trial, petitioners' counsel began personally targeting Supreme Court's principal law clerk in a highly unprofessional and inappropriate manner. For example, during her opening statement, one of petitioners' counsel improperly commented about the principal law clerk by openly complaining that she is "probably writing [the court] a note right now to say" that counsel's arguments were inaccurate. *See* Ex. F, Oct. 2 Tr. at 58.

9. That day, during a break from trial, Mr. Trump announced outside the courtroom door, in front of news cameras: "This rogue judge, a Trump hater. The only one that hates Trump more is his associate up there, this person that works with him, and she's screaming into his ear on almost every time we ask a question. It's a disgrace." LiveNOW from FOX, *Trump trial video: Trump blasts 'rogue' judge during break at civil fraud trial* at 1:06-1:22, YouTube (Oct. 2, 2023), https://www.youtube.com/watch?v=59momWwUiGQ. The court then gave petitioners an off-the-record warning about the inappropriate nature of those comments. *See* Ex. F, Oct. 3 Tr. at 270.

10. Despite that warning, the next morning on October 3, Mr. Trump posted a personally identifying and inappropriate remark about Supreme Court's principal law clerk on the Truth Social social-media platform. A copy of Mr. Trump's Truth Social posts is attached as Exhibit 1. In the post, Mr. Trump asserted that it was "disgraceful" that she was "running this case against me." In that same post, he reposted a photograph of the principal law clerk and U.S. Senator Charles Schumer, taken at an April 2022 event, and claimed that she was "Schumer's girlfriend." Through his presidential campaign, Mr. Trump emailed the post to millions of recipients. *See* Ex. F, Oct. 3 Tr. at 270; *id.*, Oct. 20 Tr. at 2023. And he boasted to the news cameras outside the courtroom, "you saw what was just put out about Schumer and the principal clerk." @SkyNews, Twitter (Oct. 3, 2023, 1:01 p.m.), https://twitter.com/i/status/1709252399234260995.

11. That afternoon, Supreme Court issued an on-the-record order "forbidding all parties from posting, emailing, or speaking publicly about any members of [the court's] staff." Ex. F, Oct. 3 Tr. at 271. As the court explained, Mr. Trump's statements about the principal law clerk were "disparaging, untrue and personally identifying." *Id.* at 270. The court further explained that such "[p]ersonal attacks on members of [the] court staff" were "unacceptable" and "inappropriate." *Id.* And the court explicitly warned the parties that violations of the October 3 order would result in "serious sanctions." *Id.* at 271. At that time, Mr. Trump represented to the court that he would not engage in similar conduct again. *See id.*, Oct. 20 Tr. at 2021.

12. On October 26, Supreme Court entered a so-ordered transcript containing the October 3 order. A copy of that so-ordered transcript is attached as Exhibit 2.

B. Supreme Court Issues Its October 20 and 26 Sanctions Orders Against Mr. Trump for Violations of the October 3 Order

13. Supreme Court, during the next few weeks, addressed two instances where Mr. Trump violated the October 3 Order.

14. First, despite the order, Mr. Trump failed to remove the offending Truth Social post about the principal law clerk from his campaign website for 17 days, until October 20. *See* Ex. G, Oct. 20 Order at 1. As a result, the post remained viewable to millions of people.

15. Supreme Court offered petitioners an opportunity to explain on the record their ongoing publication of the Truth Social post, informing them on the evening of October 19 that they should prepare to address the matter the next day in court. *See* Ex. K, Oct. 19 Email from Supreme Court. Petitioners and petitioners' counsel were thus able both to consult regarding how Mr. Trump's presidential campaign posted the website statements and to present that information to the court. *See* Ex. F, Oct. 20 Tr. at 2023-25 (discussing counsel's "confirmation" of certain

facts). Petitioners, however, did not dispute that the offending statements in fact remained on Mr. Trump's campaign website for 17 days after the October 3 order issued.

16. On October 20, Supreme Court issued a sanctions order that required Mr. Trump to pay "a nominal fine" of $5,000 for violating the October 3 order. Ex. G, Oct. 20 Order at 2. The court warned of the dangers of allowing the post to remain published on Mr. Trump's campaign website, explaining that "[i]n the current overheated climate, incendiary untruths can, and in some cases already have, led to serious physical harm, and worse." *Id.* The court also rejected Mr. Trump's argument that their continued publication of the Truth Social post resulted from only the "campaign structure." *Id.* at 1-2. Petitioners' counsel identified no person ultimately responsible for Mr. Trump's presidential campaign other than Mr. Trump. *See* Ex. F, Oct. 20 Tr. at 2022-26. And Mr. Trump did not dispute that the violation resulted from the actions of his employees or agents. *See id.* at 2023 (blaming "campaign communication team"); *see also* Ex. G, Oct. 20 Order at 2 (holding that actions of employees or agents are enough for imposing sanctions).

17. Second, despite the multiple warnings and the first sanction, Mr. Trump violated the October 3 order yet again. On October 25, during a break from trial, Mr. Trump announced to the news cameras outside the courtroom: "This judge is a very partisan judge, with a person who's very partisan sitting alongside of him, perhaps even much more partisan than he is." Jack Queen & Luc Cohen, *Donald Trump Fined $10,000 for Second Gag Order Violation in Civil Fraud Case*, Reuters (Oct. 25, 2023), https://www.reuters.com/legal/donald-trump-michael-cohen-face-off-again-new-york-fraud-trial-2023-10-25/ (video at 0:00-0:10).

18. When the parties returned to the courtroom after the break, Supreme Court observed that Mr. Trump appeared to have again made disparaging comments about its principal law clerk. And the court reiterated the need to protect its staff in this "overheated environment," explaining

that "I don't want anybody killed." Ex. F, Oct. 25 Tr. at 2372-73. The court then gave Mr. Trump ample opportunity to respond. For example, the court confirmed that petitioners' counsel had a chance to confer with Mr. Trump about to whom he was referring in his remark. The court provided counsel time to argue that Mr. Trump had been referring to the witness who was testifying that day rather than the principal law clerk. *Id.* at 2374, 2415-23. And the court held a hearing, in which the court placed Mr. Trump under oath and questioned him about the statement. *See id.* at 2412-15. After listening to Mr. Trump's testimony, the court found "not credible" his assertion that his comment had referred to the witness rather than to the principal law clerk. *See id.* at 2415

19. As a result, Supreme Court again sanctioned Mr. Trump, this time in the amount of $10,000. Ex. F, Oct. 25 Tr. at 2415, 2423. The court memorialized that ruling in an order issued the next day. Ex. H, Oct. 26 Order. The court determined that Mr. Trump, "[q]uite clearly, was referring, once again, to my Principal Law Clerk, who sits alongside me on the bench." *Id.* at 1. As the court explained, Mr. Trump's language "mirror[ed]" his prior language on October 3, when he complained about the principal law clerk "'up there'" at the bench who works with the court and was purportedly "'screaming into [the judge's] ear.'" *Id.* at 2. The court further explained that it was implausible that Mr. Trump's statement had referred to a witness because the witnesses did not sit alongside the judge and instead sat "in the witness box, separated from the judge by a low wooden barrier." *Id.*

20. On October 26, 2023, Mr. Trump paid the $5,000 and $10,000 fines to the New York Lawyers' Fund for Client Protection. Ex. I, Oct. 26 Letter from Alina Habba.

C. Supreme Court Issues Its November 3 Order to Protect the Court's Staff and Preserve the Orderly Administration of Proceedings After Petitioners' Counsel Make Inappropriate Remarks About the Principal Law Clerk

21. Around the time of the second sanctions order, petitioners' counsel again began making unprofessional and inappropriate comments about Supreme Court's principal law clerk. Petitioners' counsel made repeated comments about where the principal law clerk sits in the courtroom, taking issue with her sitting near the judge. *See, e.g.*, Ex. F, Oct. 25 Tr. at 2308, 2416, 2419-20; *id.*, Oct. 26 Tr. at 2470-71; *id.*, Nov. 2 Tr. at 3398-99. And counsel similarly made repeated comments about the principal law clerk passing notes to the judge during the trial. *See, e.g.*, *id.*, Oct. 26 Tr. at 2470; *id.*, Oct. 31 Tr. at 1911; *id.*, Nov. 1 Tr. at 3061; *id.*, Nov. 2 Tr. at 3396, 3399, 3404. For instance, petitioners' counsel insisted that "the law secretary is writing notes advocating" to the court. *Id.*, Oct. 26 Tr. at 2470. Counsel also cast aspersions on the court's process for consulting with its principal law clerk, such as announcing during trial that "I'll wait again to get the note" from the clerk, because the court "may have a question" based on that note or because the note might instead just be about "dinner." *Id.*, Nov. 2 Tr. at 3396. Counsel openly accused the court of "co-judging" with its principal law clerk. *Id.* at 3403.

22. On November 2, Supreme Court cautioned petitioners' counsel to stop referring to its staff and that the court was considering expanding the October 2 order to cover counsel. *Id.* at 3396-97. The court explained to counsel that the principal law clerk is a civil servant whose job is to assist the court in processing and deciding cases. *Id.* at 3396. Indeed, the court explained, judges have a right to receive advice from their law clerks. *Id.* at 3400.

23. On November 3, petitioners' counsel continued to insist on discussing the principal law clerk's role at trial. *See id.* at 3408-23. For instance, counsel suggested that her passing notes to the judge somehow injected possible bias into the trial. *Id.* at 3418. But the court explained (again) to counsel that this was part of its "unfettered right to get advice from my principal law

clerk or assistant law clerk." *Id.* at 3411. The court noted that it was a shame that counsel, in attacking the principal law clerk at trial, had "descended to this level." *Id.* at 3422.

24. Later that day, Supreme Court issued an order prohibiting all counsel from making "public statements, in or out of court, that refer to *any* confidential communications, in any form," between the court and its staff. *See* Ex. J, Nov. 3 Order at 3. The court observed that it had initially imposed the October 2 order on only the parties because it had been "operating under the assumption that such a gag order would be unnecessary upon the attorneys, who are officers of the Court." *Id.* at 1. However, the court explained, petitioners' counsel had made "repeated, inappropriate remarks" about the court's principal law clerk, including making "long speeches" alleging that it is improper for a judge to consult with a law clerk during proceedings. *Id.* at 2. The court explained that petitioners' arguments had no basis because it is well established that "[a] judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibility." *Id.* at 2 (quoting 22 N.Y.C.R.R. § 100.3(B)(6)(c)). The court further explained that petitioners' counsel had already "had ample opportunity to make their record, and they have at length," and that their objections to the principal law clerk's role were preserved. *Id.* at 3. The court underscored that its order was to protect the safety of its staff and promote the orderly progression of the trial. *Id.*

D. Supreme Court Declines to Sign Petitioners' Proposed Order to Show Cause on Their Motion for a Mistrial

25. On November 15, petitioners presented an order to show cause to Supreme Court, requesting that the court direct briefing on their motion for a mistrial. Petitioners' motion again raised issues about the principal law clerk. For example, petitioners again accused the court of "co-judging" by consulting its law clerk. (*See* Nov. 15 Mot for Mistrial at 4, No. 452564/2022, Sup. Ct. NYSCEF Doc. No. 1634.)

26. On November 17, Supreme Court declined to sign the proposed order to show cause and provided an accompanying decision that explained its reasoning. A copy of that declined order to show cause and the accompanying decision is attached as Exhibit 3. In particular, the court explained that petitioners' arguments were "utterly without merit" and that there was "absolutely no 'co-judging' at play." Ex. 3, Nov. 17 Decision at 3. The court again explained that the court has a right to consult its law clerks. *Id.* at 2. And the court emphasized that the principal law clerk "does not make rulings or issue orders—I do." *Id.*

E. The Interim Stay and Subsequent Events

27. On November 15, petitioners filed the instant article 78 petition in this Court, challenging Supreme Court's October 3 and November 3 orders as unconstitutional under the First Amendment of the U.S. Constitution and Article I, Section 8 of the New York Constitution and challenging Supreme Court's October 20 and 26 sanctions orders as unlawful. Pet. ¶¶ 126-252.

28. On November 16, a single justice of this Court granted an interim stay of those orders while this Court resolves petitioners' motion for a stay of the orders pending its disposition of the article 78 petition. *See* Interim Order, NYSCEF Doc. No. 7 (Nov. 16, 2023).

29. Since this Court's grant of an interim stay, Mr. Trump has engaged in a number of personal attacks against Supreme Court's principal law clerk on the Truth Social social-media platform. For example, on November 16, he posted that the court's "politically biased and out of control, Trump Hating Clerk, who is sinking him and his Court to new levels of LOW, is a disgrace." Ex. 1, Truth Social Posts at 2. Two days later, he reposted an online article suggesting that the principal law clerk engaged in drug use. *Id*. at 3. In yet another post, Mr. Trump lambasted the "crooked and highly partisan Law Clerk" and stated that she "should be sanctioned and prosecuted over this complete and very obvious MISCARRIAGE OF JUSTICE!!!" *Id.* at 4. Just

yesterday, on November 21, Mr. Trump again attacked the "horrendous, seething with ANGER Law Clerk, with her illegal campaign contributions." *Id.* at 5.

30. The return date on petitioners' stay motion is November 27.

ARGUMENT

THE COURT SHOULD DENY PETITIONERS' MOTION FOR A STAY

31. A stay pending appeal under C.P.L.R. 7805 is an extraordinary remedy to which petitioners have not shown any entitlement. To earn that relief, petitioners must establish a probability of success on the merits of their article 78 petition. *See Rand v. Rand*, 201 A.D.2d 403, 403 (1st Dep't 1994). Here, it is well established that "prohibition is an extraordinary remedy which lies only where a clear legal right to such relief exists, and only when a court 'acts or threatens to act either without jurisdiction or in excess of its authorized powers.'" *Matter of Neal v. White*, 46 A.D.3d 156, 159 (1st Dep't 2007) (footnote omitted) (quoting *Matter of Holtzman v. Goldman,* 71 N.Y.2d 564, 569 (1988)). Prohibition is "*never* available merely to correct or prevent trial errors of substantive law or procedure, however grievous." *Id.* at 159 (quotation marks omitted); *see Matter of Johnson v. Price*, 28 A.D.3d 79, 81 (1st Dep't 2006).

32. Petitioners must further demonstrate the prospect of irreparable harm without a stay. *See DeLury v. City of New York*, 48 A.D.2d 405, 405 (1st Dep't 1975). This Court is also "duty-bound to consider the relative hardships that would result from granting (or denying) a stay," *Da Silva v. Musso*, 76 N.Y.2d 436, 443 n.4 (1990), which in this context entails weighing the prejudice to OAG and the public if the stay is granted, *see* Mark Davies et al., 8 *New York Practice Series, Civil Appellate Practice* § 9:4 (3d ed. May 2023 update) (Westlaw). Petitioners cannot challenge Supreme Court's orders through article 78, and in any event, each of this Court's stay criteria warrants denial of petitioners' stay motion here.

A. Article 78 Is Unavailable to Challenge Supreme Court's Orders.

33. As a threshold manner, the Court should deny a stay because petitioners cannot challenge Supreme Court's orders through an article 78 proceeding. By its plain terms, article 78 cannot be used to challenge a determination that "can be adequately reviewed by appeal to a court or to some other body or officer." C.P.L.R. 7801(1); *see Matter of Rush v. Morgue*, 68 N.Y.2d 348, 354 (1986) (applying this rule to petition seeking prohibition). Here, Supreme Court's orders were issued without motion practice during a civil case. Petitioners may file a motion to vacate those orders and appeal from any denial of that motion to obtain an appeal. *See Sholes v. Meagher*, 100 N.Y.2d 333, 335-36 (2003); *Budwilowitz v. Marc Nichols Assoc.*, 195 A.D.3d 404, 144 (1st Dep't), *appeal dismissed & lv. denied*, 37 N.Y.3d 1132, *rearg. denied*, 38 N.Y.3d 1001 (2021), *cert. denied*, 143 S. Ct. 429 (2022). Because petitioners have adequate appellate remedies, article 78 is unavailable. *See Matter of Molea v. Marasco*, 64 N.Y.2d 718, 720 (1984); *see also Matter of Northern Manhattan Equities, LLC v. Civil Ct. of the City of N.Y.*, 191 A.D.3d 536, 536 (1st Dep't 2021).

34. Petitioners incorrectly claim (Pet. ¶¶ 179-80, 231-32) that article 78 is available to review the October 3 and November 3 orders that restricted their statements regarding Supreme Court's staff. Petitioners rely on (Pet. ¶¶ 185, 243-44) article 78 challenges to gag orders that arose in criminal cases, but the underlying case here is civil rather than criminal. That distinction matters because the Court has only granted "Article 78 relief vacating gag orders preventing counsel from speaking with the press in the course of *criminal prosecutions*," *Matter Fischetti v. Scherer*, 44 A.D.3d 89, 91 (1st Dep't 2007) (emphasis added), where immediate review is presumably needed to protect the criminal defendant's constitutional jury-trial rights, *see Matter of New York Times Co. v. Rothwax*, 143 A.D.2d 592, 592 (1st Dep't 1988). No such concerns are at issue in this civil bench trial.

35. Petitioners also err in arguing (Pet. ¶¶ 30, 145) that the October 20 and 26 sanctions orders are reviewable under article 78 because they are orders "summarily punishing a contempt committed in the presence of the court," s*ee* C.P.L.R. 7801(2). As explained below (*infra* ¶¶ 69-77), Supreme Court imposed sanctions for frivolous conduct and did not hold Mr. Trump in contempt, let alone do so summarily. The Court of Appeals has indeed held that those challenging a sanctions order entered without motions practice must instead proceed by first moving to vacate the order and then appealing from any denial of that motion. *See Sholes*, 100 N.Y.2d at 335-36.

B. The Court Should Deny Petitioners' Request to Stay the October 3 or November 3 Orders Prohibiting Statements Regarding Supreme Court's Staff.

1. Petitioners have no likelihood of success on the merits because the October 3 and November 3 orders are constitutional.

36. The Court should also deny a stay because the October 3 and November 3 orders each fully complies with both the federal and state Constitutions. Neither the First Amendment of the U.S. Constitution nor Article I, Section 8 of the New York Constitution prohibit trial courts from restricting speech of trial participants if it threatens the safety of the court's staff or frustrates the orderly progression of an ongoing trial. To the contrary, courts have the power to impose reasonable restrictions on both litigants and their attorneys during ongoing proceedings when necessary to safeguard those important interests.

37. It is well established that, "[a]lthough litigants do not surrender their First Amendment rights at the courthouse door, those rights may be subordinated to other interests that arise in this setting." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 n.18 (1984) (quotation marks omitted); *see Matter of Fischetti*, 44 A.D.3d at 92-93 ("[I]t is important to remember that reasonable limitations may be placed on speech where an important countervailing interest is being served."). As the U.S. Supreme Court has explained, the right to freedom of speech "must not be

allowed to divert the trial from the very purpose of a court system to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures." *Sheppard v. Maxwell*, 384 U.S. 333, 350-51 (1966). Thus, courts have an affirmative duty to "take such steps by rule and regulation that will protect their processes from prejudicial outside interferences," and "[n]either prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." *Id.* at 363.

38. In light of these important considerations present during ongoing litigation, "[t]he Supreme Court and [federal] Courts of Appeals have recognized a distinction between participants in the litigation and strangers to it, pursuant to which gag orders on trial participants are evaluated under a less stringent standard than gag orders on the press." *United States v. Brown*, 218 F.3d 415, 425 (5th Cir. 2000) (quotation marks omitted); *see Matter of National Broadcasting Co. v. Cooperman*, 116 A.D.2d 287, 292-93 (2d Dep't 1986) (similar). A more stringent standard is required for restraints on the press because of the "unique role" the press plays as the "public's 'eyes and ears'" into the judicial system. *Brown*, 218 F.3d at 427. Unlike trial participants, "[t]he press . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism," and the Supreme Court "has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media." *Sheppard*, 384 U.S. at 350. Trial participants do not play this same role, *see id.* at 350-51—indeed, "[i]n the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104 n.21 (1981). Thus, as both federal courts and New York courts have recognized, "the tests which must be applied in cases involving prior restraints on publication are stricter than the tests which

may be applied to prior restraints upon attorneys, parties, jurors and court personnel." *Cooperman*, 116 A.D.2d at 293 (citing *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 562 (1976)); *see Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1072-73 (1991) (drawing "distinction between participants in the litigation and strangers to it" under the First Amendment).

39. Accordingly, while restraints imposed by a trial court on the press or other non-trial participants "bear a heavy presumption of constitutional invalidity which may only be overcome upon a showing of a 'clear and present danger' of a serious threat to the administration of justice," *Cooperman*, 116 A.D.2d at 292, the same rule does not apply to restraints imposed by a court on trial participants.[2] Instead, as it relates to the free-speech rights of litigants or their attorneys outside the courtroom, prior restraints may be imposed on a "showing of a necessity for such restraint and a determination that less restrictive alternatives" are unavailable. *Id.* at 293; *see Rothwax*, 143 A.D.2d at 592. The requisite necessity for a prior restraint on trial participants can be established "upon a showing of a 'reasonable likelihood' of a serious and imminent threat to the administration of justice." *Cooperman*, 116 A.D.2d at 292; *accord Cleveland v. Perry*, 175 A.D.3d 1017, 1019 (4th Dep't 2019); *Matter of Fischetti*, 44 A.D.3d at 93; *In re Dow Jones & Co., Inc.*, 842 F.2d 603, 610 (2d Cir. 1988). A judicial order restraining speech should be "limited solely to information or statements which might be likely to impugn the fairness and integrity of the trial." *Cooperman*, 116 A.D.2d at 294.

[2] Petitioners rely on inapposite cases applying the "clear and present danger" test to prior restraints in contexts that do not involve participants in an ongoing trial. *See* Pet. ¶¶ 183-85. Petitioners' reliance on *Ash v. Board of Managers of the 155 Condominium* is misplaced as it used that standard to assess, in part, a litigant's manner of communicating with his own counsel. *See* 44 A.D.3d 324, 325 (1st Dep't 2007). Moreover, though the Court in that case drew the "clear and present danger" test from *Cooperman*, *id.* at 325, *Cooperman* held that that the "clear and present danger" test applies to restraints imposed on "the rights of free speech and publication *by the media*." 116 A.D.2d at 290 (emphasis added). *Cooperman* then made clear that restraints on trial participants, as opposed to the media, are *not* required to meet that high standard. *Id.* at 292-93.

40. The free-speech rights of attorneys *inside* the courtroom during litigation are even more limited. "[A] trial court has broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to admonish counsel and witnesses when necessary." *Pramer S.C.A. v. Abaplus Intl. Corp.*, 123 A.D.3d 474, 474 (1st Dep't 2014) (quotation marks omitted); *see* C.P.L.R. 4011 ("The court may . . . regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum."). Thus, "[i]t is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed."[3] *Gentile*, 501 U.S. at 1071; *see Mezibov v. Allen*, 411 F.3d 712, 720-21 (6th Cir. 2005) ("[I]n the context of the courtroom proceedings, an attorney retains no personal First Amendment rights when representing his client in those proceedings."). As the U.S. Court of Appeals for the Sixth Circuit explained in rejecting the argument that attorneys have First Amendment rights in the courtroom, "[a]n attorney's speech in court and in motion papers has always been tightly cabined by various procedural and evidentiary rules, along with the heavy hand of judicial discretion." *Mezibov*, 411 F.3d at 717.

41. Applying these principles, the October 3 and November 3 orders comport with free-speech rights, and the Court should thus deny petitioners' request for a stay.

[3] This Court has recognized an attorney's right to free speech inside the courtroom in only extremely limited contexts that are not present here. *See Matter of Frankel v. Roberts*, 165 A.D.2d 382, 384-85 (1st Dep't 1991) (concluding that attorneys had a constitutional right to wear a "button with a political slogan" in the courtroom during a pre-trial proceeding where the trial court only precluded them from doing so because it disagreed with the message expressed).

a. The October 3 order is appropriately tailored to protect Supreme Court's staff from harassment and harm, without undue burden on the parties' speech.

42. Supreme Court's October 3 order properly prohibited the parties in the underlying proceeding from making public statements about members of the court's staff to protect their safety and the progress of proceedings. *See* Ex. F, Oct. 3 Tr. at 270.

43. Supreme Court adequately demonstrated the necessity of a restraint on the parties' speech. Contrary to petitioners' arguments (Pet. ¶¶ 193, 198), the need to protect the court's staff and manage the trial were well founded. The court issued the October 3 order only after learning that Mr. Trump had made "a disparaging, untrue and personally identifying [social-media] post about a member of [the court's] staff." Ex. F, Oct. 3 Tr. at 270. The post included a picture of the court's principal law clerk with a U.S. Senator, insinuated that the clerk had a personal relationship with him, and attacked her integrity. *See* Ex. 1, Truth Social Posts at 1. This personally identifying post targeting a member of the court's staff was not only posted online but was also emailed to millions of other recipients. *See* Ex. F, Oct. 3 Tr. at 270; *id.*, Oct. 20 Tr. at 2023.

44. Supreme Court reasonably determined that such posts put the court's staff at risk of harassment and harm, *see* Rules of the Chief Administrator § 130-1.1(c)(2), creating a "'reasonable likelihood' of a serious and imminent threat to the administration of justice." *Cooperman*, 116 A.D.2d at 292. As the court later explained, it has been "inundated with hundreds of harassing and threat[en]ing phone calls, voicemails, emails, letters, and packages." Ex. J, Nov. 3 Order at 2. In light of these harassing and threatening communications, the court properly concluded that any purported constitutional right of the parties to engage in personal attacks on its staff were outweighed by the need to protect its staff and ensure the progress of trial.

45. Supreme Court's order was especially appropriate because of Mr. Trump's pattern of similar conduct in other trials where he is a defendant. For example, in the criminal prosecution of Mr. Trump pending in the U.S. District Court for the District of Columbia, the court imposed a similar order on Mr. Trump after he made personally identifying and disparaging statements on social media about individuals involved in those proceedings, determining that Mr. Trump's "statements pose sufficiently grave threats to the integrity of these proceedings that cannot be addressed by alternative means." Order at 3, *United States v. Trump*, No. 23-cr-257 (D.D.C. Oct. 17, 2023), ECF No. 105, *appeal pending*, No. 23-3190 (D.C. Cir.).[4] As that court found, "[u]ndisputed testimony . . . demonstrates that when [Mr. Trump] has publicly attacked individuals . . . those individuals are consequently threatened and harassed." *Id.* at 2. For example, after Mr. Trump attacked a government official in charge of election integrity via social media, the official received death threats and had to evacuate their home. *See* Compl., *Krebs v. Trump*, No. 484243V (Md. Cir. Ct. Montgomery County Dec. 8, 2020). The former Lieutenant Governor of Georgia similarly received death threats after Mr. Trump attacked him on social media. *See* MSNBC, Morning Joe, *Georgia's Lieutenant Governor Won't Seek Reelection, Turns Focus to GOP 2.0* (May 18, 2021), https://www.msnbc.com/morning-joe/watch/georgia-s-lieutenant-governor-won-t-seek-reelection-turns-focus-to-gop-2-0-112276037799.

46. Mr. Trump has continued this pattern in the underlying trial proceedings here. In addition to the social-media posts that prompted the October 3 order, Mr. Trump has repeatedly and routinely attacked the judge, the Attorney General, witnesses, and other individuals involved in these proceedings. See *supra* ¶¶ 8-30. For instance, this past week, Mr. Trump called for the

[4] The U.S. Court of Appeals for the D.C. Circuit issued an administrative stay of that order on November 3, 2023, and has heard argument in the appeal as of November 20. *See* Order, *United States v. Trump*, No. 23-3190 (D.C. Cir. Nov. 3, 2023), ECF No. 2025399.

judge and the Attorney General to be criminally prosecuted and further reposted a call for a citizen's arrest of those individuals. *See* Ex. 1, Truth Social Posts at 4; Alison Durkee, *Trump Escalates Attacks On Judge, NY Attorney General—Shares Post Urging They Face 'Citizen's Arrest'*, Forbes (Nov. 14, 2023), https://www.forbes.com/sites/alisondurkee/2023/11/14/trump-shares-suggestion-for-ny-judge-and-attorney-general-to-face-citizens-arrest-latest-attack-during-fraud-trial/. Supreme Court thus reasonably concluded that the October 3 order was necessary to protect the safety of its staff—civil servants who support the judge presiding over the trial but who themselves make no decisions. *See* Ex. F, Nov. 2 Tr. at 3396.

47. The October 3 order is also properly limited to safeguarding the important interests of protecting the court staff's safety and preserving the fairness and integrity of the trial.[5] *See Cooperman*, 116 A.D.2d at 294. The only topic that the October 3 order prohibits is comments about members of the court's staff. The October 3 order does not prohibit the parties (or anyone else) from publicly discussing any aspect of the case, commenting on the trial or the court itself, or even making comments about the judge or the Attorney General—broad leeway of which Mr. Trump has taken extensive advantage. *See KPNX Broadcasting Co. v. Arizona Superior Ct.*, 459 U.S. 1302, 1306 (1982) (Rehnquist, J.) (denying stay because orders did "not prohibit the reporting of any facts on the public record" and because "trial has never been closed, and all the proceedings may be reported and commented upon").

48. The October 3 order is thus not overbroad, as petitioners baselessly claim. *See* Pet. ¶¶ 192-94. To the contrary, the October 3 order is far narrower than other orders that this Court

[5] Petitioners miss the mark in arguing (Pet. ¶ 215) that the October 3 order cannot further an important interest because this is a bench trial rather than a jury trial. As this Court has explained, there are important interests other than protecting the jury that can "justify a reasonable limitation on free speech, including the "privacy interests" of individuals involved in the trial proceedings. *Matter of Fischetti*, 44 A.D.3d at 93.

and other courts have deemed overbroad. For example, in *Rothwax*, this Court rejected an order that prohibited any discussion of "th[e] case or any subject aspect thereof, or decision relating thereto with the press or media" except for certain scheduling matters. 143 A.D.2d at 592. (quotation marks omitted). Similarly, in *Cooperman*, the Second Department rejected an order that prohibited attorneys "from speaking to the news media on any matters related to the trial." 116 A.D.2d at 293; *see Cleveland*, 175 A.D.3d at 1019 (rejecting order that prohibited parties from "making extrajudicial statements about the action or the underlying facts in a public forum or in front of the media").[6] Here, the October 3 order does not preclude any discussion of the case except for statements about the court's staff and is thus properly "limited solely to information or statements which might be likely to impugn the fairness and integrity of the trial." *Cooperman*, 116 A.D.2d at 294. Contrary to petitioners' arguments (Pet. ¶¶ 193, 212), Supreme Court need not have identified a specific threat to a member of its staff to justify the order; courts have acknowledged "the 'necessity' of some 'speculation' and the weighing of 'factors unknown and unknowable' confronting a trial judge" in equivalent situations. *In re Russell*, 726 F.2d 1007, 1011 (4th Cir. 1984) (quoting *Nebraska Press*, 427 U.S. at 563); *see Brown*, 218 F.3d at 431. In any

[6] In some cases, courts have even approved of broad orders prohibiting extrajudicial speech about a case to protect the integrity of the proceedings. *See, e.g.*, *Brown*, 218 F.3d at 430 (order prohibiting "'[s]tatements or information intended to influence public opinion regarding the merits of this case'"); *In re Stone*, 940 F.3d 1332, 1336, 1338 (D.C. Cir. 2019) (orders required the defendant "not to discuss the case in any way"); *In re Dow Jones & Co.*, 842 F.2d at 605-06 (order that, with the exception of two narrow carve-outs, "prohibits virtually all other extrajudicial speech relating to the" case); *United States v. Tijerina*, 412 F.2d 661, 663 (10th Cir. 1969) (contempt convictions for defendants who violated an order prohibiting trial participants from making public statements regarding "the merits of the case, the evidence, actual or anticipated, the witnesses or rulings of the Court"); Order, *United States v. Bankman-Fried*, No. 22-cr-673 (S.D.N.Y. July 26, 2023), ECF No. 180 (order precluding public discussion of "anything about the case"). The October 3 order is far narrower than these orders as well.

event, as the court explained, it has been "inundated with hundreds of harassing and threat[en]ing phone calls, voicemails, emails, letters, and packages" during the trial. Ex. J, Nov. 3 Order at 2.

49. Supreme Court also properly held that no less restrictive alternatives were available to protect its staff's safety and the integrity of the trial. Indeed, before it issued the October 3 order, the court had warned petitioners that personal attacks on the court's staff would not be tolerated, but the warning was disregarded. Ex. F, Oct. 3, Tr. at 270. And Mr. Trump's subsequent conduct confirms that he will not voluntarily refrain from attacking the court's staff. The October 3 order warned the parties that any violation would result in sanctions, *id.* at 271, but Mr. Trump failed to remove the offending social-media post from his website and made additional comments about the principal law clerk to the press, including stating that she is "very partisan," see *supra* ¶ 17.

50. The October 3 order is also not unconstitutionally vague. *See* Pet. ¶¶ 217-19. A restraint on speech is vague only when it "fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and it is written in a manner that permits or encourages arbitrary or discriminatory enforcement." *Matter of Independent. Ins. Agents & Brokers of N.Y., Inc. v. New York State Dept. of Fin. Servs.*, 39 N.Y.3d 56, 63-64 (2022) (quotation marks omitted). Here, the order—which "forbid[s] all parties from posting, emailing, or speaking publicly about any members of [the court's] staff, *see* Ex. F, Oct. 3 Tr. 271—is quite clear. Courts have rejected such vagueness challenges to far broader orders in other cases. *See, e.g.*, *Brown*, 218 F.3d at 430 (rejecting vagueness challenge to order that prohibited "'[s]tatements or information intended to influence public opinion regarding the merits of this case'"); *Levine v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 764 F.2d 590, 598-99 (9th Cir. 1985) (rejecting vagueness challenge to order that prohibited "any statements to members of the news media concerning any aspect of this case that bears upon the merits to be resolved by the jury").

51. Petitioners miss the mark in arguing (Pet. ¶¶ 219-25) that the October 3 order is vague because Supreme Court concluded that it applied to Mr. Trump's statement to the press that "[t]his judge is a very partisan judge with a person who's very partisan sitting alongside him, perhaps even more partisan than he is." *See* Ex. H, Oct. 26 Order at 1. That Mr. Trump's statement omits the principal law clerk's name does not mean that he was referring to someone other than the court's staff. As the court reasonably concluded, Mr. Trump's statement "[q]uite clearly" referred to the judge's principal law clerk "who sits alongside me on the bench." *Id.*

52. Contrary to petitioners' arguments (Pet. ¶¶ 195, 205, 211-214), the constitutionality of the October 3 order is not altered by Mr. Trump's personal choice to run for President of the United States. Petitioners assert that the October 3 order prevents Mr. Trump from engaging in "core political speech" (Pet. ¶¶ 209, 214), but it does no such thing. As already noted, the October 3 order does not prevent Mr. Trump from offering his opinion on the case, the judge, the Attorney General, or even the witnesses—and he has done so frequently. Because the October 3 order does not violate Mr. Trump's right to free speech, petitioners also cannot rely on (Pet. ¶ 211) a purported right of the public to "hear, respond to, and amplify" Mr. Trump's speech. *See In re Dow Jones*, 842 F.2d at 608 (explaining that the public's "right to receive speech does not enlarge the rights of those directly subject to [a] restraining order").

b. The November 3 Order is appropriately tailored to protect the orderly administration of the trial proceedings from disruptive and unprofessional conduct of petitioners' attorneys.

53. The Court should also deny a stay of Supreme Court's November 3 order, which properly prohibited counsel for all parties from "making any public statements, in or out of court, that refer to *any* confidential communications, in any form, between" the court's staff and the court. *See* Ex. J, Nov. 3 Order at 3.

54. As it applies to statements or arguments made by counsel in the courtroom during the trial, the November 3 order was well within Supreme Court's broad discretion to "regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum." C.P.L.R. 4011. The court has "broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to admonish counsel and witnesses when necessary." *Pramer*, 123 A.D.3d at 474 (quotation marks omitted). Here, as the court explained, it imposed the November 3 order only after petitioners' counsel made "inappropriate remarks about [the court's] Principal Law Clerk, falsely accusing her of bias against them and of improperly influencing the ongoing bench trial." Ex. J. Nov. 3 Order at 3. For example, the attorneys argued that it was improper for the principal law clerk to sit next to or confer with the judge during the trial, particularly by passing the judge notes. *See, e.g.*, Oct. 25 Tr. at 2308, 2416, 2419-20; *id.*, Oct. 26 Tr. at 2470-71; *id.*, Oct. 31 Tr. at 1911; *id.*, Nov. 1 Tr. at 3061; *id.*, Nov. 2 Tr. at 3396, 3398-99, 3404. Supreme Court repeatedly rejected these arguments, explaining that the well-established and lawful role of a law clerk is to assist and provide advice to the court. *See id.*, Nov. 2 Tr. at 3411. Yet petitioners' counsel would not refrain from repeating the same arguments in a vexatious and highly unprofessional manner. *See, e.g.*, *id.*, Oct. 25 Tr. at 2421; *id.*, Nov. 2 Tr. at 3400-01.

55. Given these circumstances, Supreme Court properly prohibited petitioners' counsel from continuously reraising previously rejected arguments about the principal law clerk. *See Ultracashmere House. v. Kenston Warehousing Corp.*, 166 A.D.2d 386, 387 (1st Dep't 1990) (holding that courts have authority to limit vexatious litigation); *see also Gentile*, 501 U.S. at 1071 ("An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal."). "[W]hen viewed in their proper context," the

court's actions "reveal nothing more than an evenhanded attempt 'towards focusing the proceedings on the relevant issues and clarifying facts material to the case in order to expedite the trial.'" *Solomon v. Meyer*, 149 A.D.3d 1320, 1321 (3d Dep't 2017) (quotation marks omitted).

56. Contrary to petitioners' arguments (Pet. ¶¶ 242-50), the November 3 order's application to in-court statements does not violate their counsel's right to free speech. An attorney's right to free speech in the courtroom is "extremely circumscribed," *Gentile*, 501 U.S. at 1071, and essentially nonexistent as it pertains to legal arguments, *see Mezibov*, 411 F.3d at 719 ("[M]yriad procedural and evidentiary rules, along with a liberal allowance for judicial discretion, operate to severely limit what an attorney can say in the courtroom."). Indeed, petitioners do not cite a single case applying the First Amendment to restrictions placed on an attorney's in-court statements or arguments. In any event, even if the counsel's in-court conduct implicates a right to free speech, the November 3 order does not violate it. The order does not prevent counsel from raising other objections, presenting their defenses, or calling or cross-examining witnesses. Instead, the order only prohibits counsel from raising arguments concerning a single topic—communications between the court and its staff—and Supreme Court imposed the order only because counsel would not refrain from reraising the argument after the court had rejected it. The right to free speech does not give attorneys the ability to repeatedly raise arguments that have already been rejected and have become vexatious and unprofessional. *See Gentile*, 501 U.S. at 1071; *Mezibov*, 411 F.3d at 719; *see also KPNX Broadcasting*, 459 U.S. at 1306 ("I do not have the slightest doubt that a trial judge may insist that the only performance which goes on in the courtroom is the trial of the case at hand.").

57. Petitioners' other arguments concerning the November 3 order's application to in-court statements are also meritless. The November 3 order does not "contravene[] the principles

of absolute privilege" (*see* Pet. ¶ 238), which are inapposite. Absolute privilege is a doctrine that protects attorneys from liability for defamation for statements made during court proceedings. *See Front, Inc. v. Khalil*, 24 N.Y.3d 713, 718 (2015). It does not limit the broad authority the trial court itself to control its own courtroom or to regulate the conduct of attorneys practicing before it. *See* C.P.L.R. 4011; *Pramer*, 123 A.D.3d at 474.

58. The November 3 order also does not "prevent[] counsel from abiding by their ethical obligations to advocate for their clients" (*see* Pet. ¶ 240) or punish them for making a record (*see* Pet. ¶ 237). As Supreme Court explained, petitioners' attorneys have not been prevented in any way from making a record regarding alleged bias or misconduct by the court or its staff—even though these arguments are unsubstantiated and plainly baseless. *See* Ex. J, Nov. 3 Order at 2 (explaining that "[d]efendants' attorneys have had ample opportunity to make their record, and they have at length" and that "defendants' record is now fully preserved for the duration of the proceedings"). Indeed, even after the November 3 order was issued, petitioners were able to file a proposed order to show cause for a mistrial motion that raised many of those same arguments.[7] (*See* Nov. 15 Mot for Mistrial, Sup. Ct. NYSCEF Doc. No. 1634.) Counsel have now made their record—the November 3 order merely prevents them from repeating arguments that the court has already considered and rejected, an action well within its authority. *See Pramer*, 123 A.D.3d at 474.

[7] Petitioners' reliance on *Matter of Hart (State Commn. on Jud. Conduct)*, 7 N.Y.3d 1 (2006), is misplaced. There, the trial court held an attorney's *client* in contempt after the attorney ignored the court's directive not to place on the record the circumstances of an incident that took place outside the courtroom between the client and the judge. *Id.* at 4-5. Here, petitioners' counsel have not been prevented from making a record, and none the petitioners have been sanctioned for any statements made by their counsel.

59. To the extent the November 3 order applies to statements made by the parties' counsel outside the courtroom, it does not violate their free-speech rights for essentially the same reasons that the October 3 order does not violate the parties' free-speech rights (see *supra* ¶¶ 42-52). Like the October 3 order, the November 3 order is extremely limited. The only thing that the order prohibits the attorneys from commenting on is the court's communications with its staff—an exceedingly narrow topic that petitioners' counsel has already discussed at length on the record. *See* Ex. J, Nov. 3 Order at 2. The order does not prevent counsel from publicly commenting on any other aspects of the proceedings. *See id.* In addition, as Supreme Court explained, the same concerns animating the imposition of the October 3 order—threats to and harassment of the court's staff—also animate the November 3 order. *Id.* And the court reasonably concluded that the November 3 order was necessary in light of counsel's failure to refrain from raising "repeated, inappropriate remarks about [his] Principal Law Clerk." *Id.*; *see Cooperman*, 116 A.D.2d at 294.

2. Equitable considerations preclude a stay.

60. For similar reasons, the balance of the equities and the public interest tilt sharply against a stay. As an initial matter, petitioners have not identified any urgency requiring the extraordinary relief of a stay. To the contrary, they waited weeks to appeal these orders—the first order was issued on October 3 and the second one on November 3. Petitioners inordinate delay in seeking relief itself warrants denying their request.

61. In addition, as noted, in this high-profile trial, Supreme Court has been flooded with "hundreds of harassing and threat[en]ing phone calls, voicemails, emails, letters, and packages." Ex. J, Nov. 3 Order at 2. There is a paramount interest in protecting the court's staff, and the functioning of the State's judiciary, especially in the "overheated" environment in which the trial is taking place. Ex. G, Oct. 20 Order at 1-2; Ex. F, Oct. 25 Tr. at 2372-73. Indeed, any actualized threat against the court's staff would have dangerous ramifications for others—it would endanger

security personnel charged with protecting the court and counsel, the news media, and the public, all of whom are present in the courtroom.

62. Notably, petitioners' free-speech interests here, if any, are vanishingly slim. As explained, litigants and their attorneys do not have any unfettered right to attack the integrity of trial participants during an ongoing trial. And the exceedingly narrow scope of the October 3 and November 3 orders means that, at most, those orders have only "some minimal effect" on petitioners' speech rights. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 294 (2000). Indeed, petitioners may comment about Supreme Court, the judge, witnesses, or the substance of the proceedings. As the court made clear, "You can attack me, you can do whatever you want," so long as the court's staff are not discussed. Ex. F, Nov. 6 Tr. at 3484.

63. Petitioners argue (Pet. ¶¶ 6, 18, 109-14) that they have a continued interest in commenting about the principal law clerk to preserve the appellate record, but that argument is a red herring. As Supreme Court made clear, petitioners' counsel "have had ample opportunity to make their record, and they have at length." Ex. J, Nov. 3 Order at 2. Indeed, the court ruled affirmatively that their "record is now fully preserved for the duration of the proceeding" and for purposes of any appeal. *Id.* Petitioners have even filed a mistrial motion premised largely on their rehashed arguments about the principal law clerk, and the court issued a decision declining an order to show cause on that motion and explaining why it was meritless, without invoking the limitations of the October 3 and November 3 orders. *See* Ex. 3, Nov. 17 Declined Order to Show Cause. Neither petitioners nor their counsel have any cognizable interest in repeating vexatious statements and arguments that have already been considered and rejected.

C. The Court Should Deny Petitioners' Request to Stay the October 20 and 26 Orders Sanctioning Mr. Trump.

1. Petitioners' request to stay the sanctions orders is moot.

64. As an initial matter, petitioners' stay request as to the October 20 and 26 orders should be denied as moot because Mr. Trump has already paid the monetary sanctions required by each order. *See* Ex. I, Letter from Alina Habba. A stay of those sanction orders would not provide Mr. Trump (or any of the other petitioners) with any effective relief because Mr. Trump has already complied with these orders and there is therefore nothing left to stay. Petitioners request a stay of Supreme Court's "findings" (Pet. at 57), but a stay is appropriate only to prevent "the *enforcement* of any determination under review" or "further proceedings," C.P.L.R. 7805 (emphasis added). This Court does not sit in an advisory capacity, and should not issue a stay order that is purely academic and has no effect. *See Matter of Bernstein Family Ltd. Partnership v. Sovereign Partners, L.P.*, 66 A.D.3d 1, 4 (1st Dep't 2009).

2. Equitable considerations preclude a stay.

65. The balance of the equities and public interest weigh dispositively against a stay of the two orders imposing monetary sanctions on Mr. Trump. Petitioners cannot show that they will suffer any irreparable harm without a stay of the sanction orders—a "sine qua non" for this relief. *See DeLury*, 48 A.D.2d at 405. Except for Mr. Trump, none of the petitioners was subject to the sanctions orders. They thus have not and will not suffer any harm from those orders. Nor do they have standing to assert harm on Mr. Trump's behalf.

66. Nor has Mr. Trump himself shown that he will suffer irreparable harm without a stay. Merely having to pay money is not an irreparable injury. *Matter of J.O.M. Corp. v. Department of Health of State of N.Y.*, 173 A.D.2d 153, 154 (1st Dep't 1991); *see, e.g.*, *Wall St. Garage Parking Corp. v. New York Stock Exch., Inc.*, 10 A.D.3d 223, 228-29 (1st Dep't 2004).

Here, if petitioners ultimately prevail on their petition, the money can be returned to Mr. Trump. While Mr. Trump characterizes the $5,000 and $10,000 sanctions as "punitive" (Pet. ¶ 21), he does not claim an inability to pay the fine. Nor could he plausibly do so, when he has already paid the sanctions and when he is an avowed billionaire.

67. Moreover, the public interest warrants denying the stay and instead maintaining the status quo during the adjudication of the underlying petition. To the extent that petitioners think that a stay could result in a temporary return of the monetary payments from the New York Lawyers' Fund for Client Protection—which reimburses clients who lost money because of a lawyer's dishonest conduct—to Mr. Trump, such a result is plainly not in the public interest. And a stay would improperly incentivize litigants or their counsel to not only engage in the type of inappropriate and harassing conduct at issue here, but also to engage in emergency stay practice in this Court merely to avoid paying sanctions during the short time required for the Court to adjudicate a matter on the merits.

3. There is no likelihood of success on the merits.

68. A stay is also unwarranted because petitioners are exceedingly unlikely to succeed on the merits of their challenge to the sanctions orders.

69. *First*, petitioners' arguments are based on the standards for imposing summary civil or criminal contempt (*see* Pet. ¶¶ 130-46), but Supreme Court did not hold Mr. Trump in contempt. Rather, the court appears to have imposed monetary sanctions under § 130-1.1 of the Rules of the Chief Administrator of the Courts and the court's inherent authority. *See Jones v. Camar Realty Corp.*, 167 A.D.2d 285, 286-87 (1st Dep't 1990). In each sanctions order, the court stated that it was imposing a monetary *sanction* or *fine* on Mr. Trump; it did not say that it was holding Mr. Trump in contempt of court. *See* Ex. G, Oct. 20 Order at 2; Ex. H, Oct. 26 Order at 1 (describing October 20 order as imposing "nominal sanction"); *id.* at 2 (imposing "fine of $10,000" for second

violation). Indeed, the court contrasted its imposition of monetary sanctions with contempt, explaining that *further* violations of the October 3 order might subject Mr. Trump to contempt of court. *See* Ex. G, Oct. 20 Order at 2.

70. Supreme Court acted well within its broad discretion in imposing monetary sanctions for Mr. Trump's misconduct. Under § 130-1.1, the court has broad discretion to impose "financial sanctions against either an attorney or a party" in any civil action or proceeding, *id.* § 130-1.1(b), for engaging in "frivolous conduct," *id.* § 130-1.1(a). Frivolous conduct is defined to include, inter alia, conduct undertaken primarily "to harass or maliciously injure another." *Id.* § 130-1.1(c)(2); *see Jones*, 167 A.D.2d at 286. In determining whether conduct was frivolous, a court considers, among other issues, the circumstances under which the conduct took place, including "whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party." Rules of the Chief Administrator § 130-1.1(c). Courts may impose sanctions under § 130-1.1 either upon a motion or "upon the court's own initiative, after a reasonable opportunity to be heard." *Id.* § 130-1.1(d). The form of the opportunity to be heard "shall depend upon the nature of the conduct and the circumstances of the case." *Id.* The court may impose sanctions up to the amount of $10,000 for any single occurrence of frivolous conduct. *Id.* § 130-1.2.

71. Courts have repeatedly determined that litigants or counsel who made harassing, inappropriate, or abusive statements have engaged in frivolous conduct warranting sanctions under § 130-1.1. As this Court has explained, "sanctions and costs have been imposed for insulting behavior to opposing counsel, baseless ad hominem attacks against the court and opposing party, and mischaracterization of the record." *Matter of Kover*¸134 A.D.3d 64, 74 (1st Dep't 2015). For example, the Court of Claims imposed sanctions on a litigant who sent a letter impugning the

integrity of court staff and opposing counsel by claiming, among other things, that the court's chief clerk had refused to provide claimant's motions to the judge; that the court stenographer had threatened claimant; and that an OAG attorney had offered to have sex with claimant. *See Faison v. State of New York*, 176 Misc. 2d 808, 809 (Ct. Claims 1998). The court explained that such statements were sanctionable because they constituted "a groundless attack on the motives of the Chief Clerk" and were "plainly intended to harass and demean" opposing counsel. *Id.* at 810.

72. Similarly, this Court and others have sanctioned litigants or attorneys for pursuing disrespectful ad hominem attacks against the integrity or independence of judges or the court. *See, e.g.*, *Nachbaur v. American Tr. Ins. Co.*, 300 A.D.2d 74, 75 (1st Dep't 2002) (sanctions for "baseless, serious accusations against the motion court"); *Jones*, 167 A.D.2d at 286-87 (sanctions for ad hominem attacks on judges, including claiming they had never read the appeal papers or were illegally appointed). And courts have sanctioned litigants for sending harassing and threatening communications to opposing counsel, *see Jermosen v. State*, 178 A.D.2d 810, 811 (3d Dep't 1991), or using disparaging terms or gestures during a deposition, *see Principe v. Assay Partners*, 154 Misc. 2d 702, 704 (Sup. Ct. N.Y. County 1992) (referring to counsel as "little lady" or "young girl").

73. Moreover, to ensure their proper functioning, courts "are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution." *CDR Créances S.A.S. v. Cohen*, 23 N.Y.3d 307, 318 (2014) (quoting *Anderson v. Dunn*, 19 U.S. 204, 227 (1821)). This "inherent authority," which has been recognized in New York for over a century, incudes "all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective." *Matter of Diane*

D., 161 Misc. 2d 861 (Sup. Ct. N.Y. County 1994) (quotation marks omitted); *see Jones*, 167 A.D.2d at 287. Thus, while courts may not craft their own sanctions to address a systemic problem that requires a plenary rule, they have inherent authority to impose sanctions when needed to control its order of business. *Matter of Diane D.*, 161 Misc. 2d at 863-64; *see Matter of A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 5-6 (1986) (concluding that systemic problem of frivolous filings required plenary sanctions rule, while acknowledging that "some matters . . . deal with the inherent nature of the judicial function").

74. Here, Mr. Trump's inappropriate targeting of Supreme Court's principal law clerk, using demeaning language and baselessly impugning her integrity, easily qualifies as sanctionable conduct under § 130-1.1 or the court's inherent authority. Mr. Trump used disparaging and highly inappropriate language in his first social-media post, which personally identified the clerk, falsely claimed that she was "Schumer's girlfriend," and stated that it was "disgraceful" that she was purportedly "running the case against me." Ex. 1, Truth Social Posts at 1. These offensive remarks were plainly aimed at harassing and maligning the clerk, whether they "sprang from a misogynous or other maladapted point of view," such as a tactic to make the principal law clerk uncomfortable or to anger the court. *See Principe*, 154 Misc. 2d at 708. Indeed, the subsequent unprofessional and vexatious conduct of petitioners' counsel, including continuing to comment about the principal law clerk throughout the trial and then filing a frivolous mistrial motion based nearly entirely on baseless claims about the principal law clerk, makes plain that petitioners—and, even more shockingly, their counsel—are harassing her as part of an improper tactic to disrupt trial and undermine the proceedings.

75. The surrounding circumstances further supported the imposition of sanctions. The offensive targeting of the court's staff member was not an isolated incident. The disparaging post

was emailed to millions of recipients. On the same day, Mr. Trump again harassed and demeaned the court's principal law clerk by stating to the media that "[t]he only one who hates Trump more is his associate up there, this person that works with him, and she's screaming into his ear on almost every time we ask a question. It's a disgrace." See *supra* ¶ 9. And Mr. Trump's lawyers, who have ethical and professional obligations to the court, had already by that point begun making inappropriate comments about the court's clerk—and continued doing so. *See, e.g.*, Ex. F, Oct. 25 Tr. at 2308, 2416, 2419-20; *id.*, Oct. 26 Tr. at 2470-71; *id.*, Oct. 31 Tr. at 2911; *id.*, Nov. 1 Tr. at 3061; *id.*, Nov. 2 Tr. at 3396, 3398-99, 3404. Moreover, Supreme Court imposed sanctions only after Mr. Trump disregarded warnings to stop the insulting and baseless targeting of the court's staff.

76. There is no merit to Mr. Trump's contention (*see* Pet. ¶ 12) that his reference to the person "sitting alongside" the judge was describing a witness rather than the principal law clerk. Supreme Court conducted a hearing and found Mr. Trump's testimony on this score to be not credible—a factual finding that should be accorded deference. In any event, petitioners' contention is implausible. The witness box is not located alongside where the judge sits but rather separated from where the judge sits. *See* Ex. H, Oct. 26 Order at 2. And most glaringly, one of petitioners' own oft-repeated complaints, including in their petition here, is that the principal law clerk sits alongside the judge. *See* Pet. ¶ 11; *e.g.*, Ex. F, Oct. 25 Tr. at 2308, 2416, 2419-20; *id.*, Oct. 26 Tr. at 2470-71; *id.*, Nov. 2 Tr. at 3398-99.

77. Contrary to Mr. Trump's contentions (Pet. ¶¶ 155, 166), he received sufficient due process before sanctions were imposed. Section 130-1.1 authorizes the court to impose sanctions on its own initiative, after an opportunity to be heard that is reasonable under the circumstances—which Mr. Trump plainly received. *See* Rules of the Chief Administrator § 130-1.1(d); *Matter of Gordon v. Marrone*, 202 A.D.2d 104, 110 (2d Dep't 1994). For example, before issuing the

October 20 order, the court informed petitioners' counsel that they should be prepared to address the offensive post that had remained on Mr. Trump's campaign website, provided counsel with an opportunity to consult Mr. Trump, and allowed them to present their arguments about the issue on the record. There was no need for any further hearing or evidence (*see* Pet. ¶¶ 152, 164) because there was no dispute that Mr. Trump was ultimately responsible for the initial post or that it had remained on his own website for 17 days after the October 3 order. *See Matter of Gordon*, 202 A.D.2d at 111 (evidentiary hearing unnecessary prior to imposing sanctions when "pertinent material facts were not disputed"). And Mr. Trump similarly received ample opportunity to be heard before the October 26 sanctions order issued. For example, the court gave Mr. Trump time to confer with his counsel, allowed Mr. Trump's counsel to present his argument on the record, and held a brief hearing at which Mr. Trump testified. *See* Ex. F, Oct. 25 Tr. at 2374, 2415-23. Mr. Trump thus had a reasonable opportunity to respond, and the court was entitled to find Mr. Trump's response not credible.

78. *Second*, and in any event, the sanctions orders are also proper under Supreme Court's authority to find litigants in civil contempt. Under the Judiciary Law, a litigant's disobedience of the court's lawful orders may constitute civil contempt. *See* Judiciary Law §753(A)(3) (civil contempt). Although petitioners' focus almost exclusively on these and related statutory contempt provisions, they fail to recognize the full scope of the court's authority. For civil contempt, courts also retain an "inherent authority to impose remedial fines for failure to obey their orders." *Baralan Intl. v. Avant Indus.*, 242 A.D.2d 226, 227 (1st Dep't 1997); *see* Judiciary Law § 753(A)(8); *People ex rel. Munsell v. Court of Oyer & Terminer of N.Y.*, 101 N.Y. 245, 249 (1886). This Court has indeed emphasized, as to civil contempt, that a "financial sanction to compel compliance [can be] a proper exercise of the court's discretionary power." *Matter of*

People v. Trump, 213 A.D.3d 503, 504 (1st Dep't 2023). This inherent civil-contempt authority to sanction disobedience of its judgments "is not exhausted until the purpose for which the judgment was rendered has been completely attained." *De Lancey v. Piepgras*, 141 N.Y. 88, 96-97 (1894).

79. Here, Mr. Trump twice violated Supreme Court's October 3 order. There is no dispute that the October 3 order expressed a clear and unequivocable mandate prohibiting further statements about the principal law clerk and that Mr. Trump knew about the October 3 order. *See El-Dehdan v. El-Dehdan*, 26 N.Y.3d 19, 29 (2015). And the court properly concluded that it appeared "with reasonable certainty, that the order ha[d] been disobeyed." *See id.* (quotation marks omitted). Contrary to Mr. Trump's contention that the sanctions were purely "punitive" and had to comply with the statutory procedures for criminal contempt (Pet. ¶ 21), the court issued the sanctions for the civil remedial purpose of trying to obtain Mr. Trump's compliance with the October 3 order for the remainder of the trial, and thereby to protect the safety of the court's staff and to prevent disruption to the orderly administration of the proceedings, which would prejudice OAG's ability to proceed with their case. *See* Ex. G, Oct. 20 Order at 2; Ex. H, Oct. 26 Order at 1.

80. Finally, Mr. Trump's arguments about any summary contempt findings is misplaced because, as explained, he received ample notice and opportunity to defend himself—including the ability to testify about the comment that resulted in the October 26 sanctions order. And the judge was not disqualified from ruling on the misconduct, as Mr. Trump's comments involved the court's staff rather than "disrespect to or vituperative criticism of the judge." *See* Rules of App. Div., 1st Dept. (22 N.Y.C.R.R.) § 604.2(d)(1). Indeed, the October 3 order does not preclude Mr. Trump from speaking about the judge or Supreme Court.