SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL 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., THE 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 CPLR -against- 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.	Case No. 2023-05859

PETITIONERS' MEMORANDUM OF LAW
IN FURTHER SUPPORT OF AN INTERIM STAY

HABBA MADAIO & ASSOCIATES, LLP
Alina Habba
112 West 34th Street, 17th & 18th Floors
New York, New York 10120
Phone: (908) [redacted]
Email: ahabba@[redacted]
Counsel for Donald J. Trump, Allen Weisselberg, Jeffrey McConney, The Donald J. Trump Revocable Trust,

ROBERT & ROBERT PLLC
Clifford S. Robert
Michael Farina
526 RXR Plaza
Uniondale, New York 11556
Phone: (516) [redacted]
Email: crobert@[redacted]
mfarina@[redacted]
Counsel for Donald Trump, Jr., Eric Trump, The Donald J. Trump

The Trump Organization, Inc., Trump Organization LLC, DJT Holdings LLC, DJT Holdings Managing Member LLC, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC and Seven Springs LLC

Revocable Trust, DJT Holdings LLC, DJT Holdings Managing Member LLC, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC and Seven Springs LLC

-and-

CONTINENTAL PLLC
Christopher M. Kise (of the bar of the State of Florida) by permission of this Court
101 North Monroe Street, Suite 750
Tallahassee, Florida 32301
Phone: [redacted]
ckise@[redacted]
Counsel for Donald Trump, Jr., Eric Trump, The Donald J. Trump Revocable Trust, 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

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Petitioners Donald J. Trump, Donald Trump, Jr., Eric Trump, Allen Weisselberg, Jeffrey McConney, The Donald J. Trump Revocable Trust, The Trump Organization, Inc., The 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 (collectively, "Petitioners"), through their undersigned attorneys, respectfully submit this memorandum of law in further support of a stay pending resolution of their Verified Joint Article 78 Petition ("Petition") against The Honorable Arthur F. Engoron, J.S.C. ("Justice Engoron") and the People of the State of New York by Letitia James, Attorney General of the State of New York (the "Attorney General" and, together with Justice Engoron, "Respondents").

PRELIMINARY STATEMENT

Petitioners moved for a stay of further enforcement of the Gag Orders in an attempt to redress Justice Engoron's brazen and unmitigated violations of the United States Constitution, the New York State Constitution, the Judiciary Law, and the Rules of this Court.[1] The notion that an openly and overtly partisan individual would have any role in the decision-making process of this unprecedented case runs squarely counter to the foundational principles of American judicial independence and the Constitutional guarantee of a fair trial. Indeed, this is precisely why the Code of Judicial Conduct prohibits judges and their staff from engaging in any partisan political activity. Yet here, the sweeping, unconstitutional Gag Orders, which restrict both Petitioners' and their counsel's speech, have impermissibly abrogated Petitioners' First Amendment rights to demand basic fairness and to highlight publicly the very open, public, and

[1] Defined terms used in this Memorandum shall have the meaning previously ascribed to them in the Verified Petition. NYSCEF Doc. No. 2.

partisan conduct that has infected and permeated the trial. In sum, the Gag Orders shield Justice Engoron and his openly partisan clerk from the precise scrutiny essential to maintaining public confidence in the judiciary and ensuring a fair trial. Supreme Court has ignored with impunity clear, and troubling, evidence of partisan political bias and, in so doing, undermined, perhaps irreparably, the rule of law.

Respondents[2] now urge this Court to inflict Petitioners' constitutional injury anew by vacating the interim stay and bestowing on Justice Engoron an absolute, unfettered power to punish Petitioners for validly objecting to demonstrable partisan bias on the bench. At stake is a civil defendant and frontrunning presidential candidate's ability to critique, without fear of reprisal, the court presiding over a bench trial historic both by virtue of the parties thereto and the novel manipulation of the Executive Law. The Court should reject Respondents' invitation to error and protect the bedrock rights undergirding the legitimacy and integrity of the judicial system.

Petitioners' free-speech interests are anything but "vanishingly slim." Affirmation of Dennis Fan ("Fan Aff.") [NYSCEF Doc. No. 8] ¶ 62. Petitioners are deep into the second month of a trial that the world is watching, which carries serious implications for the limits of the Attorney General's power and equally grave consequences for Petitioners' personal and business interests in this state. Each day, Petitioners must defend themselves before a *de facto* panel comprising Justice Engoron, who already determined President Trump is not credible and levied two unlawful contempt sanctions against him, and the unelected Principal Law Clerk, who openly supports and donates to Democratic figures and organizations that have declared President Trump their avowed political enemy. More fundamentally, Petitioners' interests in

[2] Justice Engoron appears in this proceeding through Lisa M. Evans, a Deputy Counsel in the Office of Court Administration of the State of New York. NYSCEF Doc. No. 9. ("Evans Aff.")

raising the issue of bias on the bench implicate a touchstone of the American constitutional framework: the ability to criticize government officials without fear of reprisal. Supreme Court's disapproval of or disagreement with Petitioners' speech, or the fact that a third party may respond to it in an abhorrent way, do not justify putting that principle at risk. If it is to have any meaning, the First Amendment must protect everyone, including Petitioners. Moreover, any enforced silence will doubtless "engender resentment, suspicion, and contempt much more than it [will] enhance respect." Bridges v. State of Cal., 314 U.S. 252, 270-271 (1941).

The Gag Orders prohibit Petitioners from making any in-court or extrajudicial statements about Justice Engoron's staff, including the Principal Law Clerk, regardless of content. Respondents do not, because they cannot, rebut Petitioners' factual allegations regarding the Principal Law Clerk's public and partisan political activities, open support for Democratic candidates and causes with demonstrated antipathy towards Petitioners, ***all during the pendency of the underlying action***, and contributions well in excess of the sum permitted by the Code of Judicial Conduct.[3] Nor do they dispute that the Principal Law Clerk sits on the bench with Justice Engoron, has been repeatedly photographed at Justice Engoron's side with his permission, rolls her eyes at remarks by Petitioners' counsel, and constantly whispers and passes notes to Justice Engoron in response to Petitioners' counsel while the parties are on the record. Nonetheless, Respondents dismiss all statements about the Principal Law Clerk as "vexatious," "baseless," and "inappropriate" because she is a "civil servant" permitted to advise Justice Engoron. Given the circumstances, this extraordinary position calls into question both the timing of the Gag Order and the integrity, ***vel non***, of the trial process. Respondents' perfunctory

[3] Many of the organizations the Principal Law Clerk supports have ***actively supported the Attorney General!*** See Petition ¶ 57. The Principal Law Clerk has also attended partisan political events ***while this case was pending***, where speakers, *inter alia*, openly advocated for Joe Biden, and commented on the fight against "development and the profits of big real estate" and the "consequences of the former President," *i.e.*, President Trump. Id.

denomination of such speech as unworthy of this Court's consideration fails to overcome all the legal infirmities fatal to the Gag Orders under the First Amendment.

At the outset, Respondents' attempt to avoid the merits of Petitioners' claims because Petitioners could possibly pursue an appeal at some future point falls flat. Ample caselaw and statutory support confirm that Petitioners' challenges to the Gag Orders, and Justice Engoron's rampant abuses of the summary contempt power, were properly made pursuant to Article 78. Moreover, the suggestion that Petitioners' sole recourse for a clear First Amendment violation is to wait months, or years, for a decision on appeal of a final judgment willfully ignores the irreparable injury inflicted when a civil defendant in a bench trial, who is also the frontrunner for the Republican presidential nomination, is silenced on a matter of such grave personal and public import.

Respondents' sole cognizable justification for the Gag Orders is that an unknown third party may react in a hostile or offensive manner to Petitioners' speech. This should be rejected. Since before the trial began and continuing thereafter, certain individuals, to whom there is no indication Petitioners have any connection or exercise any control, have engaged in behavior that Petitioners do not condone.[4] More specifically, the Hollon Aff. contains no date or time references associated with the transcribed excerpts, and nothing at all except hearsay regarding any communications to the Principal Law Clerk's personal cell phone and/or email addresses. Hollon Aff., ¶¶ 6, 9. The Hollon Affidavit also includes no mention of the fact that, on the first day of the trial, the Principal Law Clerk allowed herself to be voluntarily photographed, videotaped, and identified by name in the national and international media, despite the prior

[4] To evidence those threats, Justice Engoron submits the affirmation of Charles Hollon, Court Officer-Captain in the Department of Public Safety ("DPS") assigned to the Judicial Threats Assessment Unit. Evans Aff., Ex. E ("Hollon Aff.")

existence of purported security concerns. Moreover, the communications themselves, while vile and reprehensible, do not constitute a clear and present danger of imminent harm as required under established precedent. A presumptively invalid prior restraint simply cannot be justified *post hoc* by conflating Petitioners' valid concerns regarding Supreme Court's obvious partisan bias with the contemptible and offensive messages left by unidentified individuals on unspecified dates. While the comments by anonymous third parties regarding the Principal Law Clerk's religion, appearance, and personal activities are reprehensible, they are not properly redressed by the wholesale suspension of Petitioners' First Amendment rights, especially where, as here, serious issues relating to partisan bias on the bench loom large. That is nothing more than the endorsement of the prohibited "heckler's veto." Moreover, as noted, none of the comments represents the requisite clear and present danger of specific, imminent harm. Additionally, the purported security concerns are disingenuous given the Principal Law Clerk's voluntary public, partisan posts and political activities and her insistence in remaining as a constant and unprecedented presence on the bench, allowing herself to be filmed and then viewed by an audience of millions since the underlying, extraordinarily high-profile trial commenced.

Also, on their face and as applied, the Gag Orders have prohibited speech about the Principal Law Clerk's ***public and highly partisan political conduct***, even going so far as to prevent counsel from making a record of the Principal Law Clerk's public conduct in open court. There is no question that the Gag Orders proscribe a significant amount of constitutionally protected activity and, thus, are patently overbroad.

The Gag Orders' constitutional defects are compounded by their enforcement. In the two instances of enforcement to date, Justice Engoron has willfully abused the summary contempt power, which is properly circumscribed to conduct in Supreme Court's presence that threatens to

disrupt courtroom decorum. Each time Justice Engoron has *sua sponte* punished President Trump, he warns that the punishments will increase in severity until, apparently, Justice Engoron imprisons President Trump without abiding by any procedural protection to which President Trump is entitled by law. Justice Engoron has likewise confirmed that the Gag Orders, as applied, categorically prevent Petitioners and their counsel from making a record of his improper conduct and appearance of bias by even mentioning or referencing the Principal Law Clerk. Thus, the consequences of this Court's vacatur of the interim stay are anything but hypothetical. If this Court vacates the stay, Justice Engoron will continue to dole out punishment to President Trump and the rest of Petitioners, without any process, for raising the bench's bias against Petitioners based on Supreme Court's conduct during a public proceeding. Consequently, Petitioners respectfully request that this Court prevent further injury by continuing the November 16 stay until the Petition is decided.

ARGUMENT

THE GAG ORDERS SHOULD REMAIN STAYED

A. An Article 78 Petition is the Proper Vehicle for the Relief Petitioners Seek

As a threshold matter, the Attorney General's assertion that "petitioners cannot challenge Supreme Court's orders through an article 78 proceeding," (Fan Aff. ¶ 33), is both demonstrably incorrect and frivolous. Blackletter statutory authority and caselaw in this State mandate that an Article 78 petition is the proper vehicle to challenge both a summary punishment for contempt and the enforcement of a gag order entered during a trial. Moreover, the Attorney General's incredible claim that "petitioners have adequate appellate remedies," (id.), is nothing more than a chimera designed to lead this Court to error. Silencing Petitioners during an ongoing, historic trial, wherein the Attorney General openly seeks to misapply the Executive Law to punish her

political enemy and a frontrunning presidential candidate in the midst of a campaign, inflicts an injury that ordinary appellate processes are plainly unsuited to remedy.

1. Summary Punishment for Contempt is Reviewable in a Proceeding Pursuant to Article 78

Supreme Court is empowered, in certain limited circumstances, to punish contempt, including a violation of its order, without notice to the alleged contemnor. Judiciary Law § 755 codifies the summary contempt power: "Where the offense is committed in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing, it may be punished summarily." To exercise this power, the court, judge, or referee must make an order "stating the facts which constitute the offense and which bring the case within the provisions of this section, and plainly and specifically prescribing the punishment to be inflicted therefor." Judiciary Law § 755.

The Judiciary Law expressly provides that such an order is "reviewable by a proceeding under article seventy-eight of the civil practice law and rules." Id. Caselaw of this Department further confirms that "[w]here a contempt is committed in the immediate view and presence of the court and is punished summarily, review *must* be had under article 78 of the Civil Practice Law and Rules (formerly Civ. Prac. Act, art. 78) and *not by appeal*." People v. Epps, 21 A.D.2d 650, 650 (1st Dep't 1964) (emphasis added); see also People v. Webb, 159 A.D.2d 289, 289-290 (1st Dep't 1990) ("[T]he appropriate method of reviewing a summary adjudication of criminal contempt where the record is inadequate to permit review is by means of a CPLR article 78 proceeding."); People v. Sanders, 58 A.D.2d 525, 525 (1st Dep't 1977) (noting that "the most appropriate procedural vehicle for review of summary contempt is an article 78 proceeding").

The Attorney General's contention that this Court should deny Petitioners' application because "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,'" (Fan Aff. ¶ 33), completely ignores this blackletter law in favor of a partial quotation of CPLR § 7801.[5] The Attorney General conspicuously omits the qualifying phrase, "[e]xcept where otherwise provided by law," which plainly limits the scope of such prohibition. CPLR § 7801. Moreover, CPLR § 7801(2) explicitly excepts "an order summarily punishing a contempt committed in the presence of the court" from the statute's general prohibition. In other words, CPLR § 7801(2) codifies the Judiciary Law's prescription that a challenge to summary contempt findings *must* be brought under Article 78. Any claim to the contrary is simply untenable.

The October 20 and October 26 Orders plainly constitute unlawful exercises of Justice Engoron's summary punishment power. There can be no dispute that each Order (1) was entered *sua sponte*, without a motion on notice or an order to show cause, (2) analyzes a purported violation of the Gag Order, and (3) prescribes a punishment for such violation. While Justice Engoron failed to cite any authority for the sanctions themselves, he clearly believed he was exercising his inherent authority to punish contempt. To be sure, the sole authority Justice Engoron relied upon in entering either Order is a Third Department decision applying the standard for a finding of civil contempt. See Conners v. Pallozzi, 241 A.D.2d 719, 719 (3d Dep't 1997). Justice Engoron applied that authority to conclude that President Trump's inadvertent conduct constituted contempt inasmuch as it violated the Gag Order even if it was inadvertent.

[5] The Attorney General inexplicably cites Rush v. Mordue to support the proposition that Article 78 cannot be used to challenge Justice Engoron's orders. See Fan Aff. ¶ 33, citing Matter of Rush v. Morgue [sic], 68 N.Y.2d 348 (1986). However, the Court of Appeals in Rush merely considered when a Court should permit a writ of prohibition as a matter of discretion. Id. at 354. Here, Petitioners can point to clear statutory authority for an Article 78 proceeding. Moreover, as set forth *infra* at pp. 10-12, all relevant considerations identified by the Court of Appeals in Rush weigh in favor of prohibition in this proceeding.

As explained more fully below, the Attorney General's assertion that Justice Engoron summarily punished President Trump for "frivolous conduct," (Fan Aff. ¶ 35), under a different statute is meritless and disingenuous in equal measure. Put simply, Justice Engoron stated that he punished President Trump for violating court orders; he did not punish President Trump for "delay[ing] or prolong[ing] the resolution of the litigation, or [] harass[ing] or maliciously injur[ing] another." 22 N.Y.C.R.R. § 130-1.1(c)(2). Notably, Justice Engoron does not dispute that the Orders adjudged President Trump in contempt.[6] Thus, it is inescapable that the October 20 and October 26 Orders constitute exercises of Justice Engoron's summary contempt power that are consequently subject to review under Article 78.

2. Gag Orders Are Reviewable in a Proceeding Pursuant to Article 78 in the Nature of Prohibition

Contrary to the Attorney General's contentions, caselaw in this state is uniform that an Article 78 proceeding also lies to challenge a gag order restricting speech. In Fischetti v. Scherer, this Court specifically contemplated whether "article 78 [wa]s available" to a petitioner who sought "an order in the nature of prohibition, vacating the [gag] order and prohibiting the court from initiating contempt proceedings for any violation of the order." 44 A.D.3d 89, 91 (1st Dep't 2007). After observing that "prohibition lies only where there is a clear legal right and the respondent is acting without jurisdiction or in excess of his or her authorized powers," the Court answered that question in the affirmative, expressly noting that "this Court has granted article 78 relief vacating gag orders preventing counsel from speaking with the press in the course of

[6] Additionally, the Attorney General offers no authority for a categorical prohibition on review of summary punishment of frivolous conduct during a trial under Article 78. Rather, the Attorney General cites Sholes v. Meagher, which confirms that an *ex parte* order sanctioning parties is not appealable as of right unless the parties move to vacate the order, thereby creating a record sufficient for appellate review. 100 N.Y.2d 333, 335-36 (2003). The Attorney General's authority merely underscores that the October 20 and 26 Orders *cannot* "be adequately reviewed by appeal to a court," (CPLR § 7801[1]), absent motion practice. It does not foreclose review of the Gag Orders under Article 78.

criminal prosecutions." Id., citing New York Times Co. v. Rothwax, 143 A.D.2d 592 (1st Dep't 1988) (granting petition and vacating *sua sponte* gag order in original Article 78 proceeding); Nat'l Broadcasting Co. v. Cooperman, 116 A.D.2d 287, 294 (2d Dep't 1986) (granting petition "to the extent of prohibiting the respondent [judge] from enforcing" his gag order in original Article 78 proceeding).

The Attorney General attempts to distinguish the foregoing caselaw by claiming, without any textual basis, that those decisions are predicated on an artificial distinction that Petitioners' speech rights are subordinate to a putative criminal defendant's rights. Specifically, the Attorney General proclaims that, in her view, "immediate review [was] *presumably* needed" in Fischetti and Rothwax "to protect the criminal defendant's constitutional jury-trial rights." Fan Aff. ¶ 34 (emphasis added). The Attorney General's self-serving presumptions lack a basis in law or fact. The clear catalysts for Article 78 relief in both Fischetti and Rothwax were, as here, the petitioners' First Amendment rights. Thus, this Court has implicitly confirmed that Supreme Court's abrogation of such rights is an "arrogation of power" that would "justify burdening the judicial process with collateral intervention and summary correction." Matter of Rush v. Mordue, 68 N.Y.2d 348, 354 (1986).

The factors the Court considers in granting a writ of prohibition likewise counsel in favor of the propriety of an Article 78 proceeding. In exercising its discretion, this Court "must weigh a number of factors: the gravity of the harm caused by the act sought to be performed by the official; whether the harm can be adequately corrected on appeal or by recourse to ordinary proceedings at law or in equity; and whether prohibition would furnish 'a more complete and efficacious remedy … even though other methods of redress are technically available.'" Id. at 354, quoting Matter of Dondi v. Jones, 40 N.Y.2d 8, 14 (1976). Here, it is plain that

enforcement of the Gag Orders inflicts grave harm by violating Petitioners' deep-seated First Amendment rights and silencing public criticism of an overtly partisan individual with a central role in the decision-making process. This harm cannot be fully redressed on appeal of the final judgment. Indeed, Petitioners' counsel are precluded from even making a reviewable record of conduct, which unquestionably impacts the integrity of the trial and justifies a mistrial. Moreover, the harm in preventing a presidential candidate from sharing his perception of his factfinder's obvious, demonstrable political bias cannot be quantified or corrected on an appeal that may be decided a year from now, where the trial itself will be concluded mere months before the primaries commence.

The Attorney General paradoxically claims that Petitioners "have not identified any urgency" because "they waited weeks to appeal these orders"[7] but also declares that they should have filed a motion on notice to vacate the orders. Fan Aff. ¶ 60, 33. Even if this procedure was "technically available," (Matter of Rush, 68 N.Y.2d at 354), Petitioners are under no obligation to "fil[e] a motion to vacate those orders" and then "appeal from any denial of that motion," (Fan Aff. ¶ 33).[8] Moreover, Petitioners have ample reason to believe that exercise would be futile. In Cooperman, the petitioner was constrained to file an original Article 78 proceeding after "appl[ying] to the respondent for an order vacating his directive," which respondent "refused to hear." Cooperman, 116 A.D.2d at 289. Likewise, here, on November 17, 2023, Justice Engoron declined to sign Petitioners' order to show cause for a mistrial raising, *inter alia*, the same

[7] Petitioners waited less than two weeks after the Supplemental Gag Order was entered to seek relief, after seeking clarification as to whether it would be enforced to prohibit on-the-record statements.

[8] Tellingly, neither of the cases the Attorney General cites for this proposition concern a gag order. Rather, they address *sua sponte* orders (1) imposing sanctions for frivolous conduct and (2) dismissing plaintiff's complaint for failure to comply with a prior order. Sholes v. Meagher, 100 N.Y.2d at 335; Budwilowitz v. Marc Nichols Assoc., 195 A.D.3d 404 (1st Dep't 2021). Moreover, neither case addresses an Article 78 proceeding but, rather, recites that a *sua sponte* order can only be appealed after the appellant has made a motion to vacate.

concerns stated in the Petition, after directing Petitioners to make that motion in writing by order to show cause. See Affirmation of Clifford Robert ("Robert Aff."), Ex. C. Notably, Justice Engoron did so despite the Attorney General's request that she be permitted to oppose the motion to have it decided on notice, which would have created appealable paper. See id., Ex. B. Justice Engoron thus continued his pattern of disregarding the law with impunity, which began with his complete refusal to implement a clear mandate from this Court. The trial proceedings are now so far removed from any semblance of fairness and legitimacy that the damage to public confidence and the rule of law may prove irreparable.

Unable to guarantee that Justice Engoron would even endorse an order to show cause to vacate, Petitioners would be forced to make a motion on eight- or fourteen-days' notice and then await a decision on the motion, which could take several more months. CPLR § 2214(b). Thus, the Attorney General effectively proposes that Petitioners challenge unconstitutional orders restricting core speech, which is aimed at partisan political bias and entered during trial, only on appeal of the final judgment, a suggestion that is farcical at best. The relief Petitioners seek loses its meaning if Petitioners are forced to wait until trial is completed and an appeal fully briefed, argument had, and a decision rendered. By then, Petitioners could no longer make a record of the Principal Law Clerk's openly partisan public conduct and the Gag Orders would have no further effect.

The courts of this state have explicitly recognized that the serious injuries resulting from a prior restraint often need to be remedied on an expedited basis rather than by a protracted appeal of a final judgment. Fischetti, 44 A.D.3d at 91; Rothwax, 143 A.D.2d at 592. There is no question that the Gag Orders constitute prior restraints, which have already appreciably impacted Petitioners' First Amendment and due process rights and prevented counsel from making a

record of infectious and pervasive partisan bias, and that normal appellate processes will not accord Petitioners full relief from their injuries. Thus, Petitioners' challenge to the Gag Orders is procedurally proper.

B. The Gag Orders Are Unconstitutional

Petitioners have demonstrated in the Petition that they are entitled to a writ of prohibition preventing further enforcement of the Gag Orders. Justice Engoron has acted in excess of his jurisdiction in imposing and enforcing grossly overbroad restrictions on Petitioners' speech and counsel's advocacy during an ongoing trial in clear derogation of the freedom of speech guaranteed to Petitioners under the federal and state constitutions.

Respondents' attempt to trivialize Petitioners' First Amendment rights by unilaterally dismissing Petitioners' expressed concerns and observations about the Principal Law Clerk's continuing public conduct as "vexatious," (Fan Aff. ¶ 54), does not erase the significant documentation of that conduct outlined in the Petition and elsewhere. See Robert Aff., Ex. A. Moreover, Respondents cannot justify a facially overbroad and presumptively invalid prior restraint by conflating Petitioners' good-faith concerns about the Principal Law Clerk's bias with the contemptible speech of anonymous third parties targeting her religion, appearance, and private activities. It is beyond cavil that public speakers "are not chargeable with the danger" that people "might react with disorder or violence." Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966). The Attorney General's conclusory assertion that a writ of prohibition does not lie because Petitioners' "free-speech arguments are meritless," (Fan Aff. ¶¶ 3, 31), is thus unavailing.[9]

[9] The Attorney General's cases on this point are inapposite. See Fan Aff. ¶ 31, citing Neal v. White, 46 A.D.3d 156, 157, 159 (1st Dep't 2007) (holding that prohibition did not lie to prohibit the enforcement of a decision "den[ying] petitioner's motion to dismiss the indictment against her"); Johnson v. Price, 28 A.D.3d 79, 81 (1st

1. The First Amendment Permits Comment on the Public Appearance of Bias, Which Is Unrebutted in the Record

The Supplemental Gag Order brings into sharp relief precisely *what* speech Justice Engoron is seeking to prevent: that evincing the Principal Law Clerk's open, public, and highly partisan bias. Neither the Attorney General nor Justice Engoron rebut any of Petitioners' factual averments demonstrating the Principal Law Clerk's obvious political bias. Indeed, they cannot, given the available evidence. Rather, Respondents characterize Petitioners' allegations as "extraordinary and dangerous personal attacks made against [Supreme Court]'s staff," (Fan Aff. ¶ 2), summarily dismiss their contents as "baseless," (id.), and conclude that *any* "personally identifying" comment about the Principal Law Clerk must be prohibited to protect both her and "the ongoing trial from prejudicial interferences," (Evans Aff. [NYSCEF Doc. No. 9] ¶ 6). Respondents' opposition, which perversely labels comments highlighting bias on the bench as "prejudicial outside interference," precisely underscores why Petitioners' speech merits First Amendment protection. Additionally, the purported security concerns lack good faith and substance. Indeed, while such concerns seek here to form a convenient basis to evade public scrutiny for openly partisan conduct, they are not credible in view of the Principal Law Clerk's own intentionally high-profile conduct.

As detailed in the Petition, the Principal Law Clerk made an unsuccessful run for a Democratic Party nomination for Civil Court in 2022, while serving as Justice Engoron's law clerk. Petition ¶ 52. In connection with that campaign, the Principal Law Clerk created and maintained a public website with a link to her public Instagram account with the personally identifying handle "greenfield4civilcourt."[10] Id. In her February 26, 2022, post withdrawing

Dep't 2006) (holding that prohibition did not lie to prohibit Supreme Court from "imposing a higher standard of proof than that provided by" the Criminal Procedure Law in sentencing).

[10] Upon information and belief, the account was only made private after the trial began. Petition ¶ 53.

from the election, the Principal Law Clerk explicitly advised followers to "keep an eye on this space," previewing her desire to run for public office again in the future. Id. at ¶¶ 55-56, 62. In subsequent months, she continued to actively publish public posts through the account, including many photographs depicting the Principal Law Clerk posing with prominent Democrats such as Senator Chuck Schumer, attending Democratic events, and supporting Democratic causes. Id. at ¶¶ 9-10, 52-58. On April 30, 2022, the Principal Law Clerk publicly posted on the "greenfield4civilcourt" Instagram account the subject photograph of herself alongside Senator Schumer ultimately reposted by President Trump, which was the impetus for the Gag Order. Id. ¶ 58.

The Principal Law Clerk's public and partisan activity while serving as Justice Engoron's law clerk is not cabined to her Civil Court campaign. The Principal Law Clerk also attended events held by the Grand Street Democrats and other organizations that expressed open support for the Attorney General's action against Petitioners and disdain for President Trump during the pendency of this matter. Id. ¶¶ 57, 199. Additionally, public records maintained by the New York State Board of Elections reflect that, in 2022 and 2023, while the underlying action and a related special proceeding were pending before Justice Engoron, and ***after the Principal Law Clerk ended her campaign for Civil Court*** (and thus was no longer a "candidate"), the Principal Law Clerk contributed to Democratic causes and candidates well in excess of the amount permitted under the Code of Judicial Conduct. Id. ¶ 57.

Notably, in a four-page advisory opinion annexed to Petitioners' unsigned proposed order to show cause seeking a mistrial, Justice Engoron attempted to address the Principal Law Clerk's contributions, which are imputed to him under the Code. Robert Aff., Ex. C. Rather than admitting the open and public ethical violation, however, Justice Engoron justified the violation

with a cherry-picked, incomplete quotation from Judicial Ethics Opinion 98-19 regarding the application of Code limitations to judicial candidates. Id. The full quotation, with the omitted portion emphasized, is as follows:

> The $500 limitation on political contributions does 'not apply to an appointee's contributions to his or her own campaign'. Nor would there be such a monetary restriction on the purchasing of tickets to political functions. *Of course, the staff member who becomes a candidate could not contribute to any candidacy other than his or her own. 22 NYCRR 100.5(A)(1)(h).*

Judicial Ethics Opinion 98-19 (emphasis added), available at: https://www.nycourts.gov/legacyhtm/ip/judicialethics/opinions/98-19.htm.

It is uncontested that the donations in question were not in support of the Principal Law Clerk's own failed campaign, from which she officially withdrew in February 2022, but were in support of other Democratic candidates and causes. When he excised the final sentence of the opinion, Justice Engoron deliberately ignored the distinction between a candidate donating to her own campaign and donating to partisan organizations in the hopes of obtaining their support. Thus, the opinion decidedly disproves Justice Engoron's conclusion that the contributions are proper. Robert Aff. Ex. C, citing Judicial Ethics Opinion 98-19. Justice Engoron's deliberate obfuscation of this fact is both troubling and telling of his ethos to defend the Principal Law Clerk's conduct regardless of whether it is proper under the law.

The Principal Law Clerk's public, partisan conduct and violation of ethical rules, which Justice Engoron clearly endorses, along with her prominent role as a "co-judge" in the decision-making process, has created an untoward appearance of impropriety suffusing an unprecedented trial of national and international significance. As is evident, it is uncontested, and plain to see from press pool photographs, the Principal Law Clerk has sat on the bench next to Justice Engoron for the entire trial. Petition ¶¶ 11, 80, 83. She constantly passes him notes, whispers in

his ear, and publicly consults with him on nearly every ruling. Id. ¶¶ 11, 17. Counsel has noted that this can happen between *thirty to forty* times a day. Id. ¶ 109. This extended consultation occurs primarily when Petitioners' counsel, rather than the Attorney General, interposes an objection. Petition, Ex. F. at 3403:8-3404:24.[11]

While generally the Principal Law Clerk, like any judicial appointee, may assist the judge in the discharge of his duties, her role as a presiding co-judge is both unprecedented and improper. As this Court undoubtedly knows, it is simply not normal or appropriate practice for a principal law clerk to sit ***on the bench*** and provide constant input while an elected Supreme Court Justice presides. Justice Engoron's emphatic contentions that he is the ultimate decisionmaker are self-serving, defensive, and untenable given that everyone in the packed courtroom can plainly observe that the parties are arguing the case to both Justice Engoron and the Principal Law Clerk. Fan Aff. ¶¶ 3, 26 ("[M]y Principal Law Clerk does not make rulings or issue orders – I do."). That Justice Engoron feels compelled to repeatedly justify his abnormal practices and assure the public that *he*, not his law clerk, is fulfilling his judicial duties, underscores the bizarre and deeply problematic nature of his practices. There is simply no room in the judicial system for openly partisan individuals to participate at all in the decision-making process.

Moreover, the Principal Law Clerk's heightened public role renders her a public figure, subject to public criticism, for purposes of the proceeding. See, e.g., Gottwald v. Sebert, 193 A.D.3d 573 (1st Dep't 2021); see also Brady v. Ottaway Newspapers, Inc., 84 A.D.2d 226, 240 n.5 (2d Dep't 1981), quoting Rosenblatt v. Baer, 383 U.S. 75, 85-86 (1966). Indeed, every comment Petitioners and their counsel made about the Principal Law Clerk concerns her public

[11] The Attorney General's contention that "counsel suggesting that [the Principal Law Clerk's] passing notes to the judge *somehow* injected possible bias into the trial" overlooks this apparent disparity. Fan Aff. ¶ 23.

presence and behavior on the bench or her public political activities. Likewise, Respondents' manufactured outrage that Petitioners have published a "personally identifying" photograph of the Principal Law Clerk should be summarily rejected where she herself initially posted the very same photograph on a public Instagram account explicitly linked to her judicial campaign, with her name in the handle. Fan Aff. ¶ 3.

Neither Petitioners nor their counsel seek to exercise, or believe they possess, an "unfettered right to attack the integrity of trial participants during an ongoing trial." Id. at ¶ 62. However, the unusual circumstances of the Principal Law Clerk's role in the underlying proceeding, coupled with her clear partisan political activities and violation of the Code, warrant comment by a defendant understandably and justifiably concerned by his *de facto* factfinder's bias. Likewise, counsel, seeking to comply with their own ethical obligations and vindicate their clients' rights, must be permitted to create a record of the Principal Law Clerk's conduct. In short, the First Amendment dictates that such speech, which strikes at the heart of the integrity of the judiciary, be made and heard.

2. Neither the Attorney General nor Justice Engoron Can Justify Imposition of the Gag Orders Under New York Law

As each of Respondents must concede, it is blackletter law that prior restraints are presumptively invalid, and, consequently, that the party seeking to impose such a restraint bears the "correspondingly heavy burden" of justifying its imposition. Ash v. Board of Managers of 155 Condominium, 44 A.D.3d 324, 325 (1st Dep't 2007).[12] Therefore, the onus is on Justice Engoron to adduce "an important countervailing interest" that would permit "reasonable limitations [to] be placed on speech." Fan Aff. ¶ 37. He fails to meet this burden.

[12] In her initial letter opposition, the Attorney General attempted to turn that burden on its head by claiming that *Petitioners* had failed to proffer a persuasive countervailing interest. NYSCEF Doc. No. 6.

i. Concerns about dangerous conduct by anonymous third parties do not justify Justice Engoron's sweeping restrictions.

Justice Engoron initially proffered, without any evidence, as justifications for the Gag Orders "the protection of [his] staff" and the need "to protect the ongoing trial from prejudicial interferences." Evans Aff. ¶¶ 5, 6. As noted above, to evidence those threats, Justice Engoron now submits the affirmation of Charles Hollon. Id., Ex. E. Mr. Hollon avers that on the second day of trial, threats, harassment, and disparaging comments to Justice Engoron's chambers "increased exponentially" and "also were now being directed at" the Principal Law Clerk. Id. ¶ 5. This, of course, admits such purported security concerns existed before the trial commenced and before any of Petitioners' statements were made. Moreover, Mr. Hollon, and Justice Engoron, fail to note that the Principal Law Clerk was voluntarily photographed, videotaped, and specifically identified by name in the national and international media on the first day of the trial. Mr. Hollon also notes that the barrage of harassing and threatening phone calls, voicemail messages, and emails have required the Judicial Threats Assessment Unit "to constantly reassess and evaluate what security protections to put in place to ensure the safety of the judge and those around him." Id. ¶ 12.

The voicemail messages transcribed in Mr. Hollon's affirmation undoubtedly contain disturbing, derogatory, and indefensible comments and threats, some of which are directed at the Principal Law Clerk. However, none of the contemptible dross reflected in those messages can be attributed to President Trump or his counsel. Nor have President Trump or his counsel ever made a statement referencing the Principal Law Clerk's religion, appearance, or private activities. Rather, the speech prohibited by the Gag Orders concerns the Principal Law Clerk's public social media posts in furtherance of her judicial campaign and in support of Democratic candidates, groups, and platforms—partisan advocacy that continued during the pendency of this

action. The prohibited speech also concerns the Principal Law Clerk's public presence and role throughout the trial and her violation of ethical proscriptions on campaign contributions. By way of example, President Trump's October 2, 2023, comment, for which he was given an "off-the-record warning," specifically concerned the fact that the Principal Law Clerk was "screaming into [Justice Engoron's] ear on almost every time *we* ask a question." Fan Aff. ¶ 9 (emphasis added).

Based upon this abundant public evidence, President Trump and his counsel have stated that the Principal Law Clerk appears to be biased against Petitioners and exerts an improper degree of influence over Justice Engoron's rulings in a case subject to unrelenting news coverage. It bears repeating that President Trump and his counsel have *never* called for violence against the Principal Law Clerk nor encouraged, or even condoned, the behavior Mr. Hollon describes. Justice Engoron's misleading contention that "conduct engaged in by Petitioners" itself consists of "the deluge of the court's chambers phone and the law clerk's personal cell phone, personal emails, and social media accounts," (Evans Aff. ¶ 5), is patently false. Despite his speculation that President Trump's comments "resulted in" an increase in threatening calls to chambers, Mr. Hollon confirms that President Trump has not threatened the Principal Law Clerk. Hollon Aff. ¶ 5. That such communications, which Mr. Hollon states began prior to the commencement of trial, increased in frequency and changed in tenor as the trial began is lamentable, but it cannot be ascribed to President Trump's re-posting of a photograph the Principal Law Clerk herself first published.

This is particularly true where Justice Engoron has actively encouraged the Principal Law Clerk's prominent and highly visible public presence during this trial, by both allowing her to sit on the bench with him and by permitting still photography and video cameras to document this

unusual arrangement and publish same in the national and international media. To be sure, countless press pool photographs and videos depicting and identifying the Principal Law Clerk by name have been published and republished in hundreds of news articles and millions of social media posts since the trial began. It is beyond cavil that Petitioners are not responsible for publicly identifying the Principal Law Clerk in any one of those photographs, articles, or social media posts.

At base, the disturbing behavior engaged in by anonymous, third-party actors towards the judge and Principal Law Clerk publicly presiding over an extremely polarizing and high-profile trial merits appropriate security measures. However, it does not justify the wholesale abrogation of Petitioners' First Amendment rights in a proceeding of immense stakes to Petitioners, which has been compromised by the introduction of partisan bias on the bench. In essence, the Constitution does not permit Justice Engoron to curtail Petitioners' speech simply because people may react to things that President Trump says. Indeed, to sustain the Gag Order on such grounds would be to sanction the heckler's veto, which the Constitution and well-settled precedent proscribe. See, e.g., Rockwell v. Morris, 12 A.D.2d 272, 279 (1st Dep't 1961) ("[T]his does not justify the perversion that if the actor's speech, otherwise innocent, incites others to unlawful action he may be suppressed."); see also Brown v. Louisiana, 383 U.S. at 133 n.1; Hoesten v. Best, 34 A.D.3d 143, 151 (1st Dep't 2006).

ii. The generic and inapposite "interests" recited by the Attorney General do not justify the Gag Orders.

The Attorney General, whose standing to contest Petitioners' claims is dubious at best,[13] has also failed to provide a constitutionally sufficient justification for the Gag Orders.

[13] The Attorney General's vociferous defense of the Gag Orders is all the more puzzling given that they, on their face, also restrict her own speech. Petition ¶ 3 n.1. Nor can the Attorney General identify any "prejudice to OAG . . .if the stay is granted." Fan Aff. ¶ 32.

First, the Attorney General adduces a bevy of incomplete citations to inapposite cases largely concerning jury trials. As this Court in Fischetti made clear, a defendant's right to a fair trial is a constitutionally enshrined countervailing interest that may, under certain circumstances, justify a gag order on the "extrajudicial statements of attorneys" that are "likely to materially prejudice the case," upon "a demonstration that such statements present a reasonable likelihood of a serious threat to a defendant's right to a fair trial." Fischetti v. Scherer, 44 A.D.3d 89, 92–93 (1st Dep't 2007) (internal quotations and citations omitted). While this Court in Fischetti stated that a "party's right to a fair trial" was not "the only circumstance[]" in which a "reasonable limit may be placed upon speech," it cited only to the "privacy interests of the complainant [], and the interest of the State in encouraging victims of such crimes generally to report these offenses without fear of exposure." Id. at 93. Clearly, the Principal Law Clerk is not a complainant or a victim of a crime here.

Undeterred, the Attorney General nonetheless falsely inflates Fischetti's holding to suggest that it encompasses the "'privacy interests' of individuals involved in the trial proceedings." Fan Aff. ¶ 47 n.5. This definition would presumably include anyone from the Principal Law Clerk, to the Attorney General, to Justice Engoron himself. As set forth above, the Principal Law Clerk, though a civil servant and private citizen, has actively campaigned for a judicial seat and taken on a central, public role in a politically charged trial while continuing to engage in partisan activity. While the Principal Law Clerk's privacy interests are not entirely subordinated to her role as a law clerk, her public role and public conduct cannot escape public scrutiny on generic "privacy" grounds.

Sheppard v. Maxwell likewise fails to support the imposition of the Gag Orders. 384 U.S. 333 (1966). In that case, the Supreme Court described certain ameliorative steps a court could take to ensure a fair outcome in another *jury trial*:

> [W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.[14]

Id. at 363.[15] The concerns the Supreme Court identified in Sheppard—namely, prejudicial outside influences compromising a jury trial's fairness—are simply not present here. If anything, restricting Petitioners' speech about the demonstrable bias and misconduct by an attorney who, on a daily basis, sits on the bench with a Supreme Court justice, itself constitutes a "prejudicial influence" impacting Supreme Court's perceived integrity.

Gulf Oil v. Bernard is, again, inapposite. 452 U.S. 89 (1981). The Supreme Court's observation that "a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors" in contemplating whether a federal district court could "limit communications from named plaintiffs and their counsel to prospective class members,

[14] In doing so, the Supreme Court sought to protect 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. Among these 'legal procedures' is the requirement that the *jury's verdict* be based on evidence received in open court, not from outside sources." Id. at 350-351 (emphasis added and internal citations omitted). Setting aside Justice Engoron's improper *ex parte* investigations of President Trump's conduct, the risk his verdict will be based on outside evidence should be infinitesimal.

[15] Justice Engoron acontextually quotes the same language for the proposition that "[c]ourts have broad discretion to control the conduct of litigants and attorneys in ongoing proceedings." Evans Aff. ¶ 6.

during the pendency of a class action" has no application here. Id. at 104 n.21, 91.[16] Finally, the "well established" proposition that litigants' First Amendment rights "may be subordinated to other interests that arise in this setting," *i.e.*, where necessary to ensure a fair trial for a criminal defendant, was *dicta* in a case regarding a restraint on disseminating pretrial discovery. Fan Aff. ¶ 37, quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 n.18 (1984).[17]

Here, the Gag Orders are not the result of any such careful balancing of interests. They were imposed by this Court in a fit of pique. As such, they infringe upon Petitioners' constitutionally enshrined free speech rights in a non-jury trial, without even the pretense of protecting any other right Petitioners possess, and in a manner that compounds the trial's unfairness. The law of this state mandates that "a prior restraint on Petitioners' speech may only be justified where there is a "'clear and present danger' of a serious threat to the administration of justice." Ash, 44 A.D.3d at 325 (internal citations omitted).[18] No such danger has been identified here.

Finding no support for her position in caselaw, the Attorney General improperly invokes evidence *dehors* the record to justify the Gag Orders. Initially, she resorts to President Trump's alleged "pattern of similar conduct in other trials where he is a defendant." Fan Aff. ¶ 45. The Attorney General then points to social media posts made by President Trump *after* the Gag Order

[16] The Supreme Court also provided the explicit caveat that "[o]ur decision regarding the need for careful analysis of the particular circumstances is limited to the situation before us—involving a broad restraint on communication *with class members*." Id. (emphasis added).

[17] The Attorney General, at one point in her opposition, relies on the Rules of the Chief Administrative Judge authorizing sanctions, discussed *infra*, to justify imposition of the Gag Order. Fan Aff. ¶ 44, citing 22 N.Y.C.R.R. § 130-1.1.(c)(2).

[18] The Attorney General's contention that the "clear and present danger" standard does not apply to gag orders on parties because it comes from a case concerning a gag order on the press is specious. Fan Aff. ¶ 39 n.2. Ash itself concerns an order "prohibiting plaintiff Allan A. Ash from contacting any of the litigants involved in this matter during its duration." Ash, 44 A.D.3d at 324. The Attorney General's assertion that this Court in Ash "used that standard to assess, in part, a litigant's manner of communicating with his own counsel" thus misses the mark. Fan Aff. ¶ 39 n.2.

was lifted as further post-hoc justification, contending that his "subsequent conduct confirms that he will not voluntarily refrain from attacking the court's staff." Id. ¶ 49. Notably, these posts, like President Trump's initial post, contain no personal information about the Principal Law Clerk and comment only on her public political conduct and demonstrated bias. See id., Ex. 1.[19]

Neither an order entered in a federal jury trial, which is currently stayed by the D.C. Circuit,[20] nor allegations that officials in other states were targeted by third parties based on comments by President Trump justify imposing the Gag Orders here. Moreover, President Trump's recent posts contain no true threat, incitement, or other unprotected speech that warrants imposing sweeping Gag Orders. Rather, the Attorney General's arguments merely elucidate that the Gag Order was imposed because of who President Trump is, rather than his conduct in this proceeding. Rockwell, 12 A.D.2d at 279.

3. The Gag Orders Are Overbroad

Even assuming, *arguendo*, that either Respondent has provided a sufficient justification for the imposition of a gag order, the Gag Orders, as written, are unconstitutionally overbroad. In determining whether a law is overbroad, this Court must consider "whether the law on its face prohibits a real and substantial amount of constitutionally protected conduct," a necessarily fact-dependent inquiry. People v. Barton, 8 N.Y.3d 70, 75 (2006). However, rather than evaluate the sweep of the orders as written (or as applied), the Attorney General contends that the Gag Orders are "appropriately tailored" and "exceedingly limited" because they do not preclude comment on Justice Engoron, the Attorney General herself, or the trial writ large. Fan Aff. ¶ 3; pp. 18, 23.

[19] The post purportedly calling for a "citizen's arrest" did not reference the Principal Law Clerk. Id.

[20] The Attorney General misrepresented the status of Judge Chutkan's gag order in her initial letter opposition. NYSCEF Doc. No. 6. As set forth in the Petition, that order is still administratively stayed by the D.C. Circuit. Rather than admit that indisputable fact, the Attorney General instead recited the substance of the order and indicated an "appeal [was] pending." Id.

The Attorney General's self-serving and conclusory characterization of the Gag Orders as constitutional does not make them so.

The Gag Order, as written and as enforced, prohibits *any* comment by the parties about court staff, no matter how innocuous or irrelevant. It is not confined, on its face or as applied, to unprotected speech, *i.e.*, speech "directed to inciting or producing imminent lawless action." Brummer v. Wey, 166 A.D.3d 475 (1st Dep't 2018). Rather, as set forth above, it is intended to capture, and has captured, core political speech by a presidential candidate commenting on bias he perceives during his trial. In re Raab, 100 N.Y.2d 305, 312 (2003); Westchester Rockland Newspapers, Inc. v. Leggett, 48 N.Y.2d 430, 452 (1979) (Cooke, C.J., concurring). The Attorney General's glib comment that the order's constitutionality "is not altered by Mr. Trump's personal choice to run for President of the United States" disregards this well-settled principle. Fan Aff. ¶ 52. Moreover, the Attorney General's refrain that President Trump's rights cannot possibly be impaired because he is able to, and has, opined on "the case, the judge, the Attorney General, [and] even the witnesses" misses the mark. Id. First, President Trump *has* been punished for publicly commenting on a witness, namely Michael Cohen.[21] Moreover, as the frontrunner for the 2024 Republican presidential nomination and as a citizen on trial, President Trump is well within his rights to comment on what he perceives as bias. This is particularly true when this perception is based on significant public evidence, some of which he himself has witnessed. The speech Supreme Court seeks to prohibit goes to the heart of the legitimacy of the judicial system and is paramount to preserving the perception that it comprises impartial finders of fact.

[21] The Attorney General's argument that the Gag Order is not vague likewise presupposes the truth of Justice Engoron's summary conclusion that President Trump's October 25, 2023, remark was referring to the Principal Law Clerk, not Mr. Cohen. Fan Aff. ¶ 50-51.

The Supplemental Gag Order is likewise overbroad insofar as it exclusively prohibits constitutionally protected speech. The Attorney General's claim that the Supplemental Gag Order, like the Gag Order, seeks 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" is spurious. Fan Aff. ¶ 54. The Attorney General cannot identify anything disruptive about in-court comments interposed to make a record. Labelling the creation of a record "highly unprofessional," "inappropriate," "baseless," or "vexatious" does not make it so. Id. ¶¶ 8, 54.[22] That the Court entered the Supplemental Gag Order in spite of counsel's comments or declined to sign the mistrial motion does not render the concerns highlighted therein baseless. Robert Aff., Exs. A, C. As set forth above, there is a clear factual predicate for even a casual observer to note the Principal Law Clerk's open political activities, unusual place on the bench, and uncharacteristic interactions with Justice Engoron. Fan Aff. ¶¶ 54, 63.

Petitioners' arguments are buttressed by the fact that only *extrajudicial* statements may be restrained by a gag order, and only for the reasons explicated above, *i.e.*, a significant countervailing interest, such as the right to a fair trial. Fischetti, 44 A.D.3d at 92-93, citing Cooperman, 116 A.D.2d at 292; Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991). Like President Trump, counsel has never commented on anything other than the Principal Law Clerk's public presence on the bench, communications with Justice Engoron, and public political activities. While Justice Engoron may believe he has an "absolute, unfettered right" to receive advice from the Principal Law Clerk, counsel are well within their rights as advocates to critique

[22] The Attorney General's support for that proposition involved the imposition of a filing injunction after plaintiff interposed claims barred under res judicata and collateral estoppel and by the statute of limitations. Ultracashmere House, Ltd. v. Kenston Warehousing Corp., 166 A.D.2d 386, 387 (1st Dep't 1990).

Justice Engoron's unique manner of doing so, particularly given the Principal Law Clerk's demonstrated partisanship. Fan Aff. ¶ 21.

The Attorney General's suggestion that the necessary effect of striking down the Gag Orders is that "any trial could be derailed by ad hominem attacks" attempts to usher in a parade of horribles to lead this Court to error. Fan Aff. ¶ 3. Justice Engoron, like any Justice of Supreme Court, is not permitted to punish attorneys—or their clients, by extension—for making a record of his own impermissible conduct. In re Hart, 7 N.Y.3d 1, 7 (2006).[23] Precluding comment on the factfinder's perceived bias effectively prevents counsel from abiding by their ethical obligations to engage in zealous advocacy, make a record of misconduct, and preserve for appeal the Principal Law Clerk's improper public influence and Justice Engoron's open abdication of his judicial duties.

Counsel must be able to continuously and contemporaneously object to each instance of objectionable conduct, in part because the conduct's magnitude and pervasiveness is central to Petitioners' concerns. It is therefore irrelevant that the purportedly confidential communications between Justice Engoron and the Principal Law Clerk have already been the subject of on-the-record discussion. Fan Aff. ¶ 63. The intimation that Petitioners' mistrial motion constitutes a sufficient appellate record is also preposterous. That Petitioners were "able to file a proposed order to show cause" ignores the indisputable fact that the Court declined to sign that order to show cause, rendering the motion an effective nullity that Petitioners are unable to appeal. Id. at ¶¶ 58, 63. It is sophistry to contend that, based on that motion, "[c]ounsel have now made their record." Id. at ¶ 58.

[23] The Attorney General's claim that Hart is inapposite because the client, not counsel, was held in contempt, is a distinction without a difference. Fan Aff ¶ 58 n.7.

Finally, the Attorney General's undue emphasis on CPLR § 4011, as cited in Pramer S.C.A. v. Abaplus Intl. Corp., 76 A.D.3d 89 (1st Dep't 2010), is misplaced. CPLR § 4011, entitled "Sequence of Trial," provides that the "court may determine the sequence in which the issues shall be tried and otherwise 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." Justice Engoron's "broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings, and admonish counsel and witnesses when necessary" does not license him to issue unconstitutional gag orders under the guise of a provision of the CPLR authorizing bifurcation of liability from damages and re-ordering witnesses. Dillon, Practice Commentary, McKinney's Cons Laws of NY, CPLR § 4011(1).

C. Enforcement of the Gag Orders Has Consistently Violated the Judiciary Law and the Rules of the Court

Justice Engoron has twice enforced the Gag Order. On both occasions, Justice Engoron violated the Judiciary Law and Rules of this Court. As set forth more fully in the Petition, the orders enforcing the Gag Order suffer from myriad procedural infirmities and a corresponding lack of awareness, at best, of the boundaries of Justice Engoron's punitive power. If enforcement of the Gag Orders is not stayed, it is a near guarantee that Justice Engoron will continue to abuse the summary contempt power.[24]

Caselaw makes clear that the summary contempt power is extremely limited. It is intended to "preserv[e] [] the immediate order in the courtroom," such that "the right and need for an evidentiary hearing, counsel, opportunity for adjournment, reference to another Judge, and the like, are not allowable because it would be entirely frustrative of the maintenance of order."

[24] Contrary to Respondents' assertions, Petitioners do not seek to stay the sanctions themselves, as they have been paid. Rather, Petitioners have been clear from the outset that they seek a stay of further improper enforcement of the Gag Order, as evidenced by the impermissible sanctions to date.

Matter of Katz v. Murtagh, 28 N.Y.2d 234, 238 (1971). The Rules of this Court further provide that the summary contempt power be exercised "only in exceptional and necessitous circumstances," where the conduct either (1) "disrupts or threatens to disrupt proceedings actually in progress" or (2) "destroys or undermines or tends seriously to destroy or undermine the dignity and authority of the court in a manner and to the extent that it appears unlikely that the court will be able to continue to conduct its normal business in an appropriate way." 22 N.Y.C.R.R. § 604.2(a)(1).

Neither instance of contempt fell within this narrow definition. Instead, by all appearances, Supreme Court's independent research of press coverage and internet activity related to the case gave rise to each instance. Thus, Justice Engoron impermissibly exercised the summary contempt power to punish out-of-court statements he only learned about through third parties. However, that is only the first of the Orders' statutory infirmities. While Justice Engoron never identified any statutory authority in punishing President Trump, his findings do not comport with the procedural or substantive requirements for either civil or criminal contempt, each of which carry certain due process guarantees. His imposition of concededly punitive fines of $5,000 and $10,000, respectively, is far in excess of the statutory limitations applicable to both civil and criminal contempt. His reliance in the October 26 Order on "evidence" such as (i) his own testimony describing his proximity to his law clerk and the layout of the bench and witness box, (ii) unidentified statements describing a witness by his name, (iii) out-of-court statements to the press preceding the issuance of the Gag Order, and (iv) the Oxford English Dictionary was plainly inappropriate and insufficient to justify a contempt finding. Finally, inasmuch as Justice Engoron viewed the purportedly contumacious statements as

impugning his integrity and that of his staff, it was error for him even to preside over the subject contempt proceedings.

In response to the numerous deficiencies identified above and in the Petition, the Attorney General offers only the once again sanctionable *ipse dixit* that Justice Engoron's sanctions did not violate the Judiciary Law or any other rules. The Attorney General also argues, incredibly, that Justice Engoron did not exercise his summary contempt powers. Instead, she claims that Justice Engoron merely "imposed sanctions for frivolous conduct" pursuant to 22 N.Y.C.R.R. § 130-1.1, (Fan Aff. ¶¶ 35, 69). The Attorney General has no basis, other than expedience, for this claim. "22 NYCRR 130–1.1 is addressed to frivolous conduct by a party in civil litigation … It does not apply to tortious conduct in general, nor is it a substitute for the court's power to punish for contempt of its own orders." Casey v. Chem. Bank, 245 A.D.2d 258, 258 (2d Dep't 1997) (internal citations omitted), citing Matter of Kernisan v. Taylor,171 A.D.2d 869, 870 (2d Dep't 1991) (noting that "[t]he intent of that regulatory scheme is to prevent the waste of judicial resources and to deter vexations litigation and dilatory or malicious litigation tactics.").

As set forth *supra* at pp. 8-9, Justice Engoron clearly intended to exercise his authority to punish contempt when he issued the October 20 and 26 Orders. The Attorney General points out that Justice Engoron "did not say" that he was holding President Trump in "contempt of court," but this dearth of citation does not itself take the punishment outside the ambit of the Judiciary Law. It is beyond dispute that the word "frivolous" does not appear in either of the court's orders. Nor did Justice Engoron recite or allude to any part of the statute the Attorney General claims the court acted under.

The Attorney General's claim that Justice Engoron's punishments comport with the notice requirements for an ordinary finding of contempt is also meritless. The Attorney General's claim that the Judiciary Law was satisfied because Justice Engoron permitted Mr. Trump to testify, (Fan Aff. ¶ 80), defies law and logic. Justice Engoron, without authority to do so, summoned President Trump to the stand for questioning. Then, acting as judge, jury, and executioner, he adjudged President Trump "not credible" and issued a $10,000.00 fine against him, with the promise of more draconian penalties and imprisonment to come. These extraordinary actions contravene both the Judiciary Law and the Rules of this Court, which require disqualification where a finding of contempt is predicated upon the judge's own testimony or where the contempt primarily consists of vituperative criticism of the judge. 22 N.Y.C.R.R. § 604.2(d). The Attorney General's reliance on a previous sanction against President Trump, affirmed by this Court, likewise ignores that those penalties were imposed in a decision issued after a motion on notice. People v. Trump, 213 A.D.3d 503 (1st Dep't 2023).

Short on availing arguments, the Attorney General cites Baralan Int'l v. Avant Indus. for the proposition that "[c]ourts have inherent authority to impose remedial fines for failure to obey their orders." 242 A.D.2d 226, 227 (1st Dep't 1997). What she omits, however, is that this principle is included in a discussion of Judiciary Law § 753(a)(3) and other contempt cases under the Judiciary Law. Id.[25] In other words, Baralan does not give Justice Engoron *carte blanche* to ignore the strictures of the Judiciary Law. It does the opposite. Barlan confirms that the "inherent authority" of Supreme Court to punish *is* the contempt power, and the exercise of that power is governed by the applicable statutes.

[25] This Court in Baralan ultimately imposed reasonable attorneys' fees as a fine for violating discovery orders. Id.

CONCLUSION

For the foregoing reasons, Petitioners request that this Court continue the stay of the Gag Orders pending the resolution of this proceeding and grant any other such and further relief it may think proper.