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

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

DONALD J. TRUMP,

Defendant.

Ind. No. 71543-23

NOTICE OF PRESIDENT DONALD J. TRUMP'S MOTION TO TERMINATE GAG ORDER

PLEASE TAKE NOTICE that upon the annexed affirmation of Todd Blanche, dated June 10, 2024, and the accompanying memorandum of law, President Donald J. Trump, by his counsel Blanche Law PLLC, will move this Court, the Supreme Court of New York, County of New York, 100 Centre Street, New York, N.Y. 10013, on a date and time to be set by the Court, to immediately terminate the Gag Order imposed on March 26, 2024, and expanded on April 1, 2024.

Dated: June 10, 2024
New York, New York

By: */s/ Todd Blanche*
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Attorneys for President Donald J. Trump

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

THE PEOPLE OF THE STATE OF NEW YORK, - against - DONALD J. TRUMP, Defendant.	Ind. No. 71543-23 **AFFIRMATION OF TODD BLANCHE IN SUPPORT OF PRESIDENT DONALD J. TRUMP'S MOTION TO TERMINATE GAG ORDER**

Todd Blanche, a partner at the law firm Blanche Law PLLC, duly admitted to practice in the courts of the State of New York, hereby affirms the following to be true under penalties of perjury:

1. I represent President Donald J. Trump in this matter and submit this affirmation and the accompanying memorandum of law in support of President Trump's Motion to Terminate Gag Order.

2. This affirmation is submitted upon my personal knowledge or upon information and belief, the source of which is my communications with prosecutors and with other counsel, my review of documents in the case file, a review of the trial transcript, and an independent investigation into the facts of this case.

WHEREFORE, for the reasons set forth in the accompanying memorandum of law, President Trump respectfully submits that the Court should immediately terminate the Gag Order imposed on March 26, 2024, and expanded on April 1, 2024.

Dated: June 10, 2024
New York, New York

By: */s/ Todd Blanche*
Todd Blanche
Blanche Law PLLC
99 Wall Street, Suite 4460
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212-716-1250
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Attorney for President Donald J. Trump

AFFIRMATION OF SERVICE

I, Todd Blanche, an attorney admitted to practice in the State of New York and counsel for President Donald J. Trump, hereby affirm, under the penalties of perjury, that on June 10, 2024, I served the enclosed motion to terminate the Gag Order, notice, and supporting affirmation by causing a true copy of the same to be emailed to ADA Susan Hoffinger and ADA Matthew Colangelo.

/s/ Todd Blanche
Todd Blanche

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

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PRESIDENT DONALD J. TRUMP'S MOTION TO TERMINATE GAG ORDER

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I. INTRODUCTION

President Donald J. Trump respectfully submits this motion seeking immediate termination of the Gag Order imposed on March 26, 2024, and expanded on April 1, 2024, because the trial the Gag Order purported to protect is over.

From inception, the Gag Order reflected an extraordinary, unprecedented, and unwarranted restriction on the constitutionally protected speech of the leading candidate in the 2024 presidential election. As time passed, even the Court began to recognize the increasing absurdity of forbidding President Trump from responding to political attacks during the trial by the government's star witnesses, Michael Cohen and Stormy Daniels. Based on Supreme Court precedents, as well as First Department holdings applying those precedents, the injuries caused by the Gag Order were—and continue to be—irreparable. These violations have harmed not only President Trump, but also the constitutional rights of all American people to receive and engage with President Trump's protected campaign speech. For these reasons, we maintain that the Gag Order was never appropriate and are currently in the process of presenting those arguments to the New York Court of Appeals.

This motion, however, presents a narrower and simpler issue. The only concern with sufficient constitutional magnitude that courts have ever suggested could justify a prior restraint on a defendant relates to the integrity of trial proceedings. The trial is over. Because the trial is over, there is no longer any basis for the Gag Order. That is because prior restraints are presumptively unconstitutional for each and every second they are operative. Prior restraints are improper unless supported by actual, non-speculative evidence relating to current developments. Prior restraints are unlawful in the absence of a clear and present danger to a constitutional interest

that is at least proportionate to the free-speech rights that are being targeted. None of these requirements is presently satisfied. Therefore, the Gag Order cannot continue.

Although the need for the Gag Order to be lifted is amply justified by the foregoing considerations, the escalating political attacks targeting President Trump require that the Court act immediately to protect the important constitutional interests at stake. President Trump's opponents and adversaries are using the Gag Order as a political sword to attack President Trump with reference to this case, on the understanding that his ability to mount a detailed response is severely restricted by the Gag Order. For example, and predictably, Cohen and Daniels have continued to assail President Trump, and his qualifications for office in an election he is winning, based on their deeply biased views about the evidence and to make even more money for themselves. More troubling, President Biden, his campaign staff, and his surrogates have gleefully entered the fray by commenting on this case and the jury's verdict in a course of conduct that Biden initiated outside the courthouse during defense summations. Accordingly, the Gag Order should be lifted promptly to stop ongoing free-speech injuries under the New York Constitution and the First Amendment.

Finally, the District Attorney's efforts to delay filing an opposition to this motion are transparently political and shameful. In February 2024, despite two other sets of motions President Trump was in the process of addressing, the government urged haste with respect to the defense deadline to oppose their motion for a Gag Order they waited nearly a year to seek. Now they seek delay. The government does so despite the fact that, rather than working to protect New Yorkers from ever-more-prevalent violence in the City's streets, numerous prosecutors sat silently and idly in the courtroom for weeks during the trial. Post-trial, they would have the Court believe they cannot find time in their busy schedules to write an opposition brief.

The motive behind that approach was made abundantly clear when the government asked the Court via email to delay their response deadline until June 24, 2024—just days before the first scheduled presidential debate on June 27. In other words, if the government got their way, they would delay the Court's consideration of the motion until just before the presidential debate, against an opponent in Joe Biden who has made this case a campaign issue, in the hope that the Court not decide the issue until after. The suggestion that President Trump would be subject to unlawful prior restraints in a post-trial presidential debate is one of the clearest illustrations that the District Attorney, like President Biden and their overlapping cast of associates, are relying on the Gag Order as part of a lawfare strategy to try to accomplish in courtrooms what they have been unsuccessfully pursuing on the campaign trial.

The Court properly rejected the government's scheduling request. But the current briefing schedule still threatens far too much additional unconstitutional harm to President Trump and the public. We therefore urge the Court to resolve this motion as soon as possible, and in a manner that restores balance to the need for protected political speech regarding these proceedings in connection with President Trump's leading campaign. Nothing less will suffice under the state and federal constitutions. Therefore, for all of the reasons herein, the Gag Order should be terminated forthwith.

II. BACKGROUND

Although we dispute that the Gag Order was ever constitutional, necessary or appropriate, there can be no reasonable dispute from the procedural history explained below that the Gag Order was intended to restrict President Trump's extrajudicial statements during the trial. Those restrictions prevented President Trump from exercising constitutional rights during the trial, including by limiting the ability of the leading candidate in the 2024 presidential election to

respond to public political attacks from the government's star witnesses and others. As detailed below, those attacks have escalated following the trial. Like Cohen and Daniels, President Biden is seeking to capitalize on the Gag Order's restrictions by antagonizing President Trump with respect to this case, including at the presidential debate on June 27. These third parties' abuse of the Gag Order highlight the need to terminate the restrictions immediately.

A. The Gag Order Was Supposedly Intended To Address Concerns Regarding The Trial

The government waited nearly a year before seeking the Gag Order, and filed the motion on February 22, 2024. The government's purported basis for seeking the Gag Order was to "protect the integrity of this criminal proceeding and avoid prejudice to the jury." Mot. at 1. In the motion, the government claimed that President Trump's protected speech presented a "significant and imminent threat to the trial" and "the jury's functioning." *Id.* at 24, 25. We contested those arguments at the time, and still do, but the pertinent point for the current application is that the government claimed that it was concerned about the trial rather than post-trial proceedings.

By email on February 27, 2024, defense counsel requested until March 7 to respond to the government's motion, as well as a separate motion filed by the government on February 22 relating to jury procedures. Part of the basis for the request was that the government had strategically timed the filing of those motions during a period when President Trump also had a one-week deadline, of February 29, to respond to the government's motions *in limine*. Also by email on the same day, the government purported to defer to the Court. In contrast to the delay the government seeks in response to this application, the government argued that "the request for two weeks to respond [was] more time than necessary to address these motions." They claimed that their concerns were trial-related, *i.e.*, that there was a risk that the defense would "contaminate the jury pool, intimidate

witnesses, and prejudice the proceedings." The Court ultimately ruled via email that "the best I can do" is set a deadline of March 4, 2024.

President Trump complied with the deadline in an opposition filing that noted, *inter alia*, that the only case-specific evidence cited by the government was an affidavit from Nicholas Pistilli. *See* Mot. Ex. 13. Pistilli focused on events from a year earlier, in March and April 2023. *See id.* ¶ 10 (referring to "three weeks following March 18, 2023"); *id.* ¶ 12 (referring to a "peak" in "March 2023"); *id.* ¶ 13 (describing alleged threats by third parties in March and April 2023); *id.* ¶ 14 (describing so-called "terroristic" threats by third parties in March and April 2023). Pistilli emphasized the "volume" of threats despite no apparent connection to this case. *See id.* ¶ 8; *see also id.* ¶¶ 11, 13(b), 13(d), 14(a).

The Court imposed the Gag Order in a Decision and Order dated March 26, 2024. In the ruling, the Court explained that the government had sought an order "*for the duration of the trial*" and that "the eve of trial is upon us." 3/26/24 Decision and Order at 1, 3 (emphasis added). The Court found that the Gag Order was required as part of an "obligation to prevent outside influences, including extrajudicial speech, from *disturbing the integrity of the trial*." *Id.* at 2 (emphasis added) (citing *Sheppard v. Maxwell*, 384 U.S. 333, 350-51 (1966)). The Court reasoned that restrictions on free-speech rights of President Trump and the American people were necessary because, "*given that the eve of trial is upon us*, it is without question that the imminency of the risk of harm is now paramount." *Id.* at 3 (emphasis added). The Court expressed concern that, in the absence of the Gag Order, "the fairness of *the trial* is threatened" and the Court "need not wait" for "speech targeted *at the participants of this trial*." *Id.* (emphasis added).

On March 29, 2024, the government filed a letter seeking expansion of the Gag Order based on supposed concerns relating to "trial participants," "trial witnesses," and "prospective jurors."

The Court clarified and expanded the Gag Order in a Decision and Order issued on April 1, 2024. In that ruling, the Court addressed concerns about "a juror," "a witness," and personnel participating in the trial "in some other capacity." 4/1/24 Decision and Order at 3.

In an April 30, 2024 ruling regarding the government's contempt motion, the Court reiterated that it had waited to impose the Gag Order "until the eve of trial." 4/30/24 Decision and Order at 6. The Court added that it was "of the utmost importance to this Court" that the Gag Order "not be used as a sword instead of a shield by potential witnesses," and that "the Court may very well consider the propriety of continuing the limitation on extrajudicial speech as it relates to certain individuals." *Id.*

> The underlying purpose of the restriction on extrajudicial statements is to protect the integrity of these proceedings by shielding those fearful of reprisal by the Defendant so that they may take part in these proceedings without concern. However, if a protected party turns that underlying purpose on its head, it becomes apparent that the protected party likely does not need to be protected by the [Gag Order].

Id. at 6-7.

On May 2, 2024, after President Trump sought guidance from the Court regarding whether it would violate the Gag Order to re-post media articles, the Court stated: "I think when in doubt, steer clear. That's all I can say." Tr. 1943.

B. President Trump's Political Opponents Using The Gag Order As A Sword

1. President Biden

On May 28, 2024, the day of summations, President Biden's campaign issued a misdated media advisory regarding a "press conference" to be held "outside of the Manhattan Criminal Courthouse."

TODAY in Manhattan at 10:15AM: Biden-Harris Campaign to Hold Press Conference with Special Guests

Today Tuesday May 28, at 10:15AM ET the Biden-Harris campaign will hold a press conference with special guests outside of the Manhattan Criminal Courthouse

WHEN: Tuesday, May 28, 2024, arrive by 10AM ET

WHO: Biden-Harris campaign with special guests

WHERE: Centre Street and Leonard Street across from Court House, next to media staging area

One of the so-called "special guests" was Robert De Niro, whom the Biden campaign featured in emails soliciting donations while the jury was deliberating and in an advertisement where De Niro stated that he would "like to punch [President Trump] in the face."[1]

That day, May 28, 2024, De Niro made frivolous public claims on behalf of President Biden during defense summations within earshot of the courthouse.[2] Displaying the type of logic that should concern every single American, De Niro claimed "[w]e don't have a choice" other than to vote for President Biden.[3] During the same media event, another Biden surrogate explicitly implicated the Court in President Biden's campaign strategy: "We can't count on these institutions to stop Donald Trump."[4]

On May 29, 2024, President Biden's White House Press Secretary referred to the jury deliberations as "a campaign event" and indicated that "the campaign is going to have more to

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[1] Ryan Chatelain, *Robert De Niro slams Trump at Biden campaign press conference outside N.Y. courthouse*, SPECTRUM NEWS NY 1 (May 28, 2024, 4:47 PM), https://ny1.com/nyc/all-boroughs/news/2024/05/28/de-niro-trump-biden-jan-6-new-york-trial.

[2] *Id.*

[3] *Id.*

[4] *Id.*

share."[5] After the jury's verdict on May 30, President Biden's campaign issued a statement that included, "Convicted felon or not, Trump will be the Republican nominee for president."[6] On May 31, following carefully scripted remarks about the verdict at a press conference, President Biden offered a disturbing grin to the gathered media cameras when asked whether President Trump is his "political prisoner."[7]

Since the week of May 27, 2024, President Biden, his campaign, and his surrogates have continued to attack President Trump based on the verdict. For example, on June 3, President Biden stated during a reception in Connecticut that President Trump's successful campaign efforts were "disturbing," and he argued that "while Trump is worried about preserving his freedom, he's got no problem taking away your freedoms."[8] On June 4, President Biden's campaign posted on X "We will . . . !" in response to a public comment by Senator Tommy Tuberville about the Biden campaign's planned use of the phrase "convicted felon" to described President Trump.[9]

2. Michael Cohen

Immediately following the verdict on May 30, 2024, Michael Cohen posted to his X account, "Guilty On All Counts!" and took credit for the result by adding the hashtag

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[5] *Press Gaggle by Press Secretary Karine Jean-Pierre En Route Philadelphia, PA*, THE WHITE HOUSE (May 29, 2024), https://www.whitehouse.gov/briefing-room/press-briefings/2024/05/29/press-gaggle-by-press-secretary-karine-jean-pierre-en-route-philadelphia-pa-4/.

[6] @BidenHQ, X (May 30, 2024, 5:44 PM), https://x.com/BidenHQ/status/1796296637133853110.

[7] PBS News Hour, *WATCH LIVE: Biden delivers remarks on the Middle East from the White House*, YOUTUBE (May 31, 2024), https://www.youtube.com/live/oI_zyK0Gru4?si=MgR1kRIWNyjk_mtb&t=798 (at 13:20-13:40).

[8] *Remarks by President Biden at a Campaign Reception | Greenwich, CT*, THE WHITE HOUSE (June 3, 2024), https://www.whitehouse.gov/briefing-room/speeches-remarks/2024/06/03/remarks-by-president-biden-at-a-campaign-reception-greenwich-ct-2/.

[9] @BidenHQ, X (June 4, 2024, 1:07 PM), https://x.com/BidenHQ/status/1798038767334522899.

"#TeamCohen."[10] Cohen proceeded to make numerous media appearances throughout the evening and in the following days, during which he mocked President Trump and opined extensively on the Gag Order, the upcoming election, and whether President Trump should be incarcerated.[11]

On June 1, 2024, Cohen's attorney posted on X, inaccurately and in another obvious statement that Cohen and his team are using the Gag Order as a sword, that: "Although the verdict is in, Judge Merchan has decided to keep the gag order in place. I joined [MSNBC] to discuss."[12] The following morning, Cohen posted a graphic depicting a jury on X, stating: "Yes @realDonaldTrump...you actually did win the popular vote this time! #TeamCohen."[13] Cohen has since returned to his podcasts and TikTok, making inflammatory statements about President Trump and the upcoming election, including referring to President Trump as the "Devil" and claiming that President Trump's leading campaign is "political fuckery."[14]

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[10] @MichaelCohen212, X (May 30, 2024, 5:10 PM), https://x.com/MichaelCohen212/status/1796288080338354336.

[11] *See, e.g.*, CNN, *'I would like him to feel what I felt': Michael Cohen on Trump facing jail time*, YOUTUBE (May 31, 2024), https://youtu.be/4VL2_tnbnwc?si=OJXv7i9bouoc99bh&t=284 (at 4:45-5:02); Matthew Impelli, *Michael Cohen Warns Trump Will Become 'More Unhinged' Before Sentencing*, NEWSWEEK (June 5, 2024, 9:11 AM), https://www.newsweek.com/donald-trump-manhattan-criminal-trial-michael-cohen-sentencing-1907955.

[12] @Edanyperry, X (June 1, 2024, 5:00 PM), https://x.com/Edanyaperry/status/1797010233924943895.

[13] @MichaelCohen212, X (June 2, 2024, 9:10 AM), https://x.com/MichaelCohen212/status/1797254510777110679.

[14] *See, e.g.*, @michaelcohen_, TIKTOK (June 6, 2024), https://www.tiktok.com/@michaelcohen_/video/7377153029738433835?is_from_webapp=1; Mea Culpa, *Michael's Finally Back And Who Better Than Norm Eisen To Discuss The Hush Money Verdict!* (June 5, 2024), https://podcasts.apple.com/us/podcast/michaels-finally-back-and-who-better-than-norm-eisen/id1714009198?i=1000657983380 (at 2:19); Political Beatdown, *Michael Cohen IS BACK and WANTS A WORD* (June 7, 2024), https://podcasts.apple.com/us/podcast/michael-cohen-is-back-and-wants-a-word/id1669634407?i=1000658147273 (at 42:31-42:45); *see also* Political Beatdown, *Michael Cohen RETURNS...* (June 5, 2024), https://podcasts.apple.com/us/podcast/michael-cohen-

3. Stormy Daniels

Following the trial, Stormy Daniels participated in a "world exclusive" interview with *The Mirror*, a U.K.-based tabloid publication. On June 1, 2024, *The Mirror* published its first article, titled "Stormy Daniels breaks silence on Donald Trump's guilty verdict and says 'jail him now.'"[15] In a false claim bearing on President Trump's qualifications for office, Daniels baselessly argued that President Trump "is completely and utterly out of touch with reality."[16] In a separate article published by *The Mirror*, Daniels characterized her testimony as having involved "the sensationalism angle" at the trial and credited herself with having "tak[en] out a president."[17] Daniels made false, inflammatory claims about President Trump's marriage and argued that President Trump's wife needs to leave him on the grounds that "he is a convicted felon."[18] Daniels also urged voters to support President Biden: "I understand not liking either of the candidates and having difficulty bringing yourself to vote in this situation but remember, NOT voting for Biden is the same as voting FOR Trump."[19]

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returns/id1669634407?i=1000657907678; Mea Culpa, *This isn't Just Any Election!!! + A Conversation with Rick Wilson* (June 7, 2024), https://podcasts.apple.com/us/podcast/this-isnt-just-any-election-a-conversation-with-rick-wilson/id1714009198?i=1000658128095.

[15] Christopher Bucktin, *Exclusive: Stormy Daniels breaks silence on Donald Trump's guilty verdict and says 'jail him now,'* THE MIRROR (updated June 3, 2024, 11:27 AM), https://www.mirror.co.uk/news/us-news/stormy-daniels-breaks-silence-donald-32940754.

[16] *Id.*

[17] Christopher Bucktin, *Exclusive: Stormy Daniels urges Melania Trump to leave husband Donald now - for two reasons*, THE MIRROR (updated June 3, 2024, 10:04 AM), https://www.mirror.co.uk/news/us-news/stormy-daniels-urges-melania-trump-32943039.

[18] *Id.*

[19] Christopher Bucktin, *EXCLUSIVE: Stormy Daniels blasts 'disgraceful loophole' which allows newly convicted felon Trump to be re-elected*, THE MIRROR (updated June 3, 2024, 10:45 AM), https://www.themirror.com/news/us-news/stormy-daniels-blasts-disgraceful-loophole-519114.

III. DISCUSSION

The government's original motion, and the Court's analysis of that motion, purported to turn on protecting the integrity of the trial process. That process has now concluded. As a result, the Gag Order's witness-related restrictions are essentially a nullity. More broadly, New York's Court of Appeals, as well as the First Department, require "clear and present danger" to justify a prior restraint on protected speech. At present, there is no basis for concern—much less the required clear and present danger—that President Trump's protected campaign speech will harm the integrity of the remaining post-trial proceedings in this case. Therefore, the Court should terminate the Gag Order forthwith because it is unconstitutional and prejudicing the constitutional rights of President Trump and the public in connection with imminent campaign events relating to a crucially important nationwide election.

A. The Witness-Related Component Of The Gag Order Is Self-Terminating

Paragraph (a) of the Gag Order, which prohibits statements "concerning" witnesses' "potential participation in the investigation or in this criminal proceeding," has no valid application following the trial. Moreover, even during the trial, the Court appeared to acknowledge that the ongoing public tirades against President Trump by Cohen and Daniels could eventually warrant relief from the Gag Order. *See* 4/30/24 Decision and Order at 6-7 (reasoning that "if a protected party turns that underlying purpose on its head, it becomes apparent that the protected party likely does not need to be protected by the [Gag Order]"). That day has come. Therefore, we respectfully request that the Court confirm that paragraph (a) of the Gag Order is no longer operative so that President Trump may publicly address ongoing political attacks from Cohen and Daniels and explain his views regarding their trial testimony to the voters across the country who will decide the upcoming election.

B. Binding Precedent Requires Termination Of The Gag Order

Holdings from the First Department, applying precedent from the New York Court of Appeals and the U.S. Supreme Court, require that the entire Gag Order be terminated because the trial has concluded.

The free-speech protections of the New York Constitution are "often broader than the minimum required by the First Amendment." *O'Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 529 n.3 (1988). The Gag Order is a prior restraint on constitutionally protected speech and therefore "bears a 'heavy presumption against its constitutional validity.'" *Ash v. Board of Managers of 155 Condominium*, 44 A.D.3d 324, 325 (1st Dep't 2007) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). The "heavy presumption" is ongoing; it requires continuous evaluation of whether the prior restraint is appropriate and supported by adequate evidence in the record. *See id.* at 325 ("[A] party seeking to obtain such a restraint bears a correspondingly heavy burden of demonstrating justification for its imposition.").

In New York, the required showing is one of "clear and present danger." *Ash*, 44 A.D.3d at 325; *see also Oliver v. Postel*, 30 N.Y.2d 171, 180 (1972) (holding that restrictions on "the publication of out-of-court statements relating to a pending court proceeding" must be justified by "a clear and present danger" to the administration of justice); *Markfield v. Ass'n of Bar of City of N.Y.*, 49 A.D.2d 516, 517 (1st Dep't 1975) (requiring that "the extra-judicial statements were such as to present a 'clear and present danger' to the administration of justice"). Conjecture about the possibility of such a threat is not enough. "[A] 'solidity of evidence' is necessary to make the requisite showing of imminence." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 845 (1978) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946)). Under *Ash*, even "numerous, unnecessary and vexatious ramblings" may not be prohibited in the absence of a serious risk of

imminent harm backed by evidentiary support. 44 A.D.3d at 325; *see also Brummer v. Wey*, 166 A.D. 3d 475, 476 (1st Dep't 2018) (striking gag order despite "highly offensive, repulsive and inflammatory" comments). The government's evidentiary showing was stale at best in February 2024 when the motion was filed, and there is no basis at all for the Gag Order at this point in the case. Therefore, under *Oliver*, *Ash*, and similar binding authorities, the Gag Order must be put to rest.

Indeed, the Court must revisit the lack of necessity for the Gag Order because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (cleaned up). As we have explained previously, the constitutional injury from a baseless prior restraint harms President Trump and voters nationwide. *See, e.g., Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases."). Thus, the Court is required to "make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression" at this point in the proceedings—and in connection with the 2024 election. *Landmark Commc'ns, Inc.*, 435 U.S. at 843.

The only arguable basis for a prior restraint on President Trump in this case was the now-concluded trial. Time and again, the Supreme Court's evaluation of prior restraints relating to criminal cases has turned on maintaining the integrity of trials rather than post-trial proceedings. In *Capital Cities Media, Inc. v. Toole*, Justice Brennan reasoned that "[i]nsofar as the State's

interest is in shielding jurors from pressure during the course of the trial, so as to ensure the defendant a fair trial, that *interest becomes attenuated after the jury brings in its verdict and is discharged.*" 463 U.S. 1303, 1306 (1983) (Brennan, J., in chambers) (emphasis added). In *Sheppard*—which Your Honor relied upon in an effort to justify the Gag Order—the Supreme Court addressed a trial judge's "power to control the publicity *about the trial*" and focused on the need to prevent potential jurors from being impacted by pretrial publicity. 384 U.S. at 357 (emphasis added); *see also id.* at 363 (reasoning that "prejudicial news prior to trial will *prevent a fair trial*" (emphasis added)). In *Estates v. Texas*, the Supreme Court addressed the risk that pretrial publicity would "impair[]" the "quality of the testimony *in criminal trials.*" 381 U.S. 532, 547 (1965) (emphasis added). In *Nebraska Press Association v. Stuart*, each of the alternatives to prior restraints that the Supreme Court addressed focused on the trial setting: "change of trial venue," "postponement of the trial," "searching questioning of prospective jurors," and "emphatic and clear instructions" to the jury. 427 U.S. 539, 563-64 (1976). None of these cases, or any other case we are aware of, supports the continued imposition of a prior restraint on President Trump following the conclusion of a criminal trial.

Such an unlawful restraint would be egregious here, where District Attorney Bragg is seeking to help President Biden and his political associates by asking the Court to silence President Trump during and after the upcoming presidential debate. Worse still, the District Attorney is pursuing that strategy in a case he claims, falsely, is about influencing the 2016 election by allegedly withholding information from voters. The irony is palpable. "[T]he right of . . . candidates to communicate to voters is linked to the right of the electorate to make informed choices about how to cast their votes." *In re Raab*, 100 N.Y.2d 305, 313 (2003). Campaign speech lies "at the core of our electoral process of the First Amendment freedoms—an area . . . where

protection of robust discussion is at its zenith." *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (cleaned up). This Court "has no such authority to," in effect, "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992); *see also, e.g., Republican Party of Minnesota v. White*, 536 U.S. 765, 781 (2002) ("[D]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges." (cleaned up)).[20] Under these authorities, restraining post-trial campaign speech by President Trump in service of the political objectives of the District Attorney, his democrat colleagues, and President Biden would be extraordinarily problematic, unprecedented, and unwarranted.

Continued imposition of the Gag Order cannot be justified based on speculation that President Trump's protected political speech will cause independent third parties to engage in harassing communications toward those mentioned by President Trump. That logic reflects an unconstitutional heckler's veto, which is anathema to bedrock free-speech principles under the New York Constitution and the First Amendment. Specifically, speech may not be restricted based on the anticipated hostile reaction of the *audience*. *See, e.g., Rockwell v. Morris*, 12 A.D.2d 272,

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[20] *See also, e.g., Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("It is simply not the function of government to select which issues are worth discussing or debating, in the course of a political campaign." (cleaned up)); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 785-86 (1978) (emphasizing that "the First Amendment is plainly offended" where government restrictions on speech "give one side of a debatable public question an advantage in expressing its views to the people"); *Landmark Commc'ns*, 435 U.S. at 842 ("An enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." (cleaned up)); *United States v. Brown*, 218 F.3d 415, 430 (5th Cir. 2000) ("The district court also made special allowances for Brown's re-election campaign by lifting most of the order . . . for the duration of the campaign . . . . Brown was able to answer, without hindrance, the charges of his opponents regarding his indictment throughout the race."); *United States v. Ford*, 830 F.2d 596, 601 (6th Cir. 1987) (reasoning that defendant was "entitled to fight the obvious damage to his political reputation in the press and in the court of public opinion").

279-80 (1st Dep't 1961), *aff'd* 10 N.Y.2d 721 (1961) (holding that "the measure of the speaker is not the conduct of his audience," and that "the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker"). "If [the speaker] does not speak criminally, then, of course, his right to speak may not be cut off, no matter how offensive his speech may be to others. Instead, his right, and that of those who wish to listen to him, must be protected, no matter how unpleasant the assignment." *Id.* at 283; *see also Holy Spirit Ass'n for Unification of World Christianity v. Rosenfeld*, 91 A.D.2d 190, 199 (2d Dep't 1983) (holding that while a religious organization's "activities may provoke hostile and perhaps violent reactions from the families of participants and other members of the public at large," "[t]he law is well-settled . . . that public intolerance, animosity or unrest does not justify a prohibition of free assembly and association").

Likewise, under the First Amendment, speakers "are not chargeable with the danger" that their audiences "might react with disorder or violence." *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966) (plurality op.). "[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise." *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (cleaned up); *see also, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) ("Speech cannot be . . . punished or banned, simply because it might offend a hostile mob."). "The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience." *Matal v. Tam*, 582 U.S. 218, 250 (2017) (Kennedy, J., concurring in part and concurring in the judgment). "Indeed, a speech burden based on audience reactions is simply government hostility and intervention in a different guise." *Id.* Because that is exactly how the Gag Order is functioning in the post-trial environment, and because there is not a clear and present danger to the remainder of the proceedings in this case, the Gag Order must be terminated.

C. *United States v. Trump* Supports Termination Of The Gag Order

The Gag Order rests largely on the Court's view, which we dispute, that the restrictions "are consistent, in part, with those upheld" in *United States v. Trump*, 88 F.4th 990 (D.C. Cir. 2023). 3/26/24 Decision and Order at 1. Surprisingly, notwithstanding *Oliver*, *Ash*, and other New York authorities, the First Department also "adopt[ed] the reasoning" of the federal decision in *Trump*. *See Trump v. Merchan*, 2024 WL 2138460, at *2 (1st Dep't 2024).[21] *Trump* lends no support, however, for extending the Gag Order after the trial.

The D.C. Circuit's analysis of threshold jurisdictional questions under the collateral-order doctrine made clear that no party contemplated post-trial restraints on protected speech. Rather, the court focused on President Trump's "ability to speak about his criminal trial" and "the need to protect the trial process and its truth-finding function." *Trump*, 88 F.4th at 1000-01; *see also id.* at 1001 (referring to "an order regulating speech prior to and during trial"). The court's reasoning addressed the need for recourse to an interlocutory appeal because a typical post-judgment direct appeal would not allow President Trump to seek "redress or undo any unconstitutional prohibitions of speech that occurred *prior to or during trial*." *Id.* at 1001 (emphasis added).

The D.C. Circuit framed its merits analysis as a balancing of "[t]wo foundational constitutional values": "an individual's right to free speech and the fair and effective functioning of the *criminal trial process* and its truth-finding function." *Trump*, 88 F.4th at 1002 (emphasis added). As to the First Amendment, the court described political speech as "the lifeblood of American democracy," which "allows voters to make informed decisions about those who seek to represent them in government, including their character, qualifications, and policy platforms." *Id.*

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[21] We are currently seeking leave from the Court of Appeals to challenge the First Department's decision.

Moreover, in the D.C. Circuit's view, "speech about judicial proceedings, especially criminal prosecutions, promotes transparency in the legal system and 'guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.'" *Id.* at 1002-03 (quoting *Sheppard*, 384 U.S. at 350); *see also id.* at 1015 (reasoning that *Sheppard* is based on speech that "threatened the integrity of *the trial process*" (emphasis added)).

The only "compelling governmental interest" addressed in *Trump* as a basis for curbing these important rights is "the *fair administration of a criminal trial*." *Trump*, 88 F.4th at 1003 (emphasis added).[22] There is an entire section of the opinion devoted to "The Right to a Fair Trial," and the court repeatedly addressed its balancing analysis to the "trial" and the "trial process." *Id.* at 1003-07. The court also observed that "commonly, one of the most powerful interests supporting broad prohibitions on trial participants' speech" relates to the proper functioning of petit juries: "to avoid contamination of the jury pool, to protect the impartiality of the jury once selected, to confine the evidentiary record before the jury to the courtroom, and to prevent intrusion on the jury's deliberations." *Id.* at 1020. Even when weighed against those considerations, which are no longer applicable here, the D.C. Circuit explained that criminal defendants "may very well

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[22] *Accord Trump*, 88 F.4th at 1007 ("[T]he Constitution requires robust protection of speech about criminal trials and the government's effort to deprive a defendant of liberty. At the same time, the Constitution requires courts to ensure that outside speech and influences do not derail or corrupt the criminal trial process."); *id.* at 1012 (referring to a "significant and imminent threat to the functioning of the *criminal trial process*" (emphasis added)); *id.* at 1014 ("[T]he court had a duty to act proactively to prevent the creation of an atmosphere of fear or intimidation aimed at preventing trial participants and staff from performing their functions *within the trial process*." (emphasis added)); *id.* at 1016 ("[T]his record establishes the imminence and magnitude, as well as the high likelihood, of harm to the court's core duty to ensure the fair and orderly conduct of a *criminal trial and its truth-finding function*." (emphasis added)).

have a greater constitutional claim than other trial participants to criticize and speak out against the prosecution and the criminal trial process that seek to take away his liberty." *Id.* at 1008.

Unlike the present circumstances, the D.C. Circuit noted that "the general election is almost a year away . . . ." *Trump*, 88 F.4th at 1018. Despite the timing, when the prospect of President Trump's participation in a national presidential debate was far from certain, the D.C. Circuit was still concerned about requiring President Trump to address "political attacks with only an anodyne 'I beg to differ,'" as such restrictions "would unfairly skew the political debate *while not materially enhancing the court's fundamental ability to conduct the trial.*" *Id.* at 1020 (emphasis added). Thus, as to reasonably foreseeable trial witnesses, the *Trump* decision, like the Gag Order here, only countenanced speech restrictions on comments concerning "potential participation in the investigation or in this criminal proceeding." *Id.* at 1024; *see also* Gag Order ¶ (a). As noted above, those concerns no longer apply in this case. Moreover, because President Trump has no intention of making extrajudicial comments regarding the service of individual jurors, there is no basis for prohibiting criticism of the jury as an institution that rendered a contested decision in this case. *See* Gag Order ¶ (c)

As to staff and relatives, the D.C. Circuit imposed a *mens rea* requirement to "guard[] against the prospect of chilling speech that poses an immaterial risk to the criminal proceedings." *Trump*, 88 F.4th at 1026. The court cited *Counterman v. Colorado*, which described "subjective mental-state requirement[s]" as a "kind of 'strategic consideration'" that is appropriate in First Amendment analysis. 600 U.S. 66, 75 (2023). Although the text of the Gag Order includes a similar *mens rea* requirement, the application of the Gag Order has rendered a nullity this important constitutional strategic consideration for avoiding improper chilling, as illustrated by the Court's generic warning to President Trump to "steer clear." Tr. 1943. At this point, there is no

countervailing constitutional consideration to steer clear of, and nothing that warrants continued restrictions on President Trump's constitutional rights. "Discussion of [judges'] conduct is appropriate, if not necessary." *Craig v. Harney*, 331 U.S. 367, 377 (1947). That is because such speech serves "the vital function" of "guarding 'against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.'" *Oliver*, 30 N.Y.2d at 182 (citation omitted). In this regard, the Gag Order has operated to prohibit President Trump from commenting on arguments and evidence set forth in public briefing concerning our recusal motions. Because "[w]orking in the criminal justice sphere fairly requires some thick skin," *Trump*, 88 F.4th at 1027, it necessarily follows that post-trial protected speech by President Trump—especially concerning issues already raised in public filings—cannot "materially interfere with" the remainder of the proceedings in this case, Gag Order ¶ (b). Thus, continuing this aspect of the Gag Order would not "best account[] for the competing interests in effective functioning of the judicial, prosecutorial, and defense processes and the substantial First Amendment interests in speech about how governmental authority and positions of prominent responsibility in the criminal case are used." *Trump*, 88 F.4th at 1026.

Therefore, for all of these reasons, the *Trump* decision does not lend any support to continuation of the Gag Order after the jury's verdict.

IV. CONCLUSION

For the foregoing reasons, the Court should terminate the Gag Order forthwith.

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