New York County Clerk's Indictment No. 71543/23

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

IN THE MATTER OF THE APPLICATION OF DONALD J. TRUMP,

Petitioner-Appellant,

—against—

THE HONORABLE JUAN M. MERCHAN, A.J.S.C.,
THE PEOPLE OF THE STATE OF NEW YORK,
ALVIN L. BRAGG, JR., MANHATTAN DISTRICT ATTORNEY,

Respondents.

CASE NO. 2024-02369

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* CONSTITUTIONAL SCHOLARS, ETHICS EXPERTS, AND FORMER PUBLIC OFFICIALS IN SUPPORT OF RESPONDENTS

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PLEASE TAKE NOTICE that, pursuant to CPLR § 2214 and 22 N.Y.C.R.R. §§ 1250.4(f) and 600.4(b), and upon the annexed Affirmation of Joshua Matz dated April 12, 2024, and all exhibits attached thereto, including a copy of its proposed brief, proposed *amici curiae* Constitutional Scholars, Ethics Experts, and Former Public Officials, by their attorneys Kaplan Hecker & Fink LLP, will move this Court, located at 27 Madison Avenue, New York, New York 10010, on April 22, 2024, at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order permitting *amici* to serve and file a brief as *amicus curiae* in support of the State of New York in the above-captioned appeal, and granting such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, shall be served two (2) days before the return date of this motion.

Dated: New York, New York
April 12, 2024

/s/ Joshua Matz

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CASE NO. 2024-02369

AFFIRMATION OF JOSHUA MATZ IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

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JOSHUA MATZ, an attorney duly admitted to practice before this Court, hereby affirms the following to be true under penalty of perjury pursuant to CPLR § 2106:

1. I am a partner with Kaplan Hecker & Fink LLP, counsel for proposed *Amici Curiae* Constitutional Scholars, Ethics Experts, and Former Public Officials, in the above-captioned action.

2. Specifically, the proposed *Amici* are: Donald Ayer, Ty Cobb, Tom Coleman, Brian Frosh, Stephen Gillers, Barbara S. Gillers, Philip Lacovara, Frederick Lawrence, John McKay, Alan Charles Raul, Nicholas Rostow, Claudine Schneider, Laurence H. Tribe, Olivia Troye, Stanley Twardy, Shan Wu, and Ellen Yaroshefsky.

3. I submit this affirmation in support of *Amici*'s motion for leave to file an *amicus curiae* brief in the above-captioned action.

4. *Amici* do not request permission to participate in oral argument.

5. *Amici* are unable to attach a notice of appeal invoking this Court's jurisdiction for the reasons stated in **Exhibit A**.

6. A copy of *Amici*'s proposed *amicus curiae* brief is attached hereto as **Exhibit B**.

7. This Court may grant a nonparty leave to file an *amicus curiae* brief if the brief would be of assistance to the Court, especially where the case involves

questions of public importance. *See* 22 N.Y.C.R.R. § 1250.4(a)(f); *see also* 22 N.Y.C.R.R. § 500.23(a); N.Y. Jur. 2d Parties § 316 (collecting cases).

8. This case involves questions of public importance. Donald J. Trump contends that a gag order entered by Justice Merchan is unconstitutional and justifies a stay of the scheduled trial pending appellate consideration of the issue. By any measure, these are extremely important issues: how to balance Trump's free speech rights with the court's duty to protect the integrity of criminal trial proceedings; how to ensure that witnesses, court staff, counsel, and jurors (and their immediate families) are not unduly menaced, influenced, or impeded by Trump's extrajudicial statements; how to assess the proper scope and structure of the order adopted by Justice Merchan for that purpose; and whether to proceed with a trial raising fundamental questions about alleged criminal efforts undertaken to influence a presidential election, where delaying the trial would create a substantial risk of undue and injurious delay.

9. The enclosed *amicus* brief would assist the Court in understanding how to properly balance the constitutional principles that govern the gag order entered by Justice Merchan—and how to assess that order against the standard recently adopted in a comprehensive opinion by the U.S. Court of Appeals for the D.C. Circuit.

10. *Amici* are uniquely well situated to address those issues. They include preeminent experts in constitutional law and legal ethics. They also include former

public officials with substantial experience in the criminal justice system, protecting the integrity of trial proceedings, and addressing concerns of presidential misconduct.

11. By virtue of their scholarship and public service, *Amici* are committed to upholding the rule of law, protecting fundamental tenets of our democracy, and safeguarding the integrity of the criminal justice system. They also maintain a deep interest in the proper development of the law and the maintenance of constitutional protections for criminal trials where a public official seeks to threaten participants.

12. Moreover, by virtue of their scholarship and public service, *amici* are well positioned to assist the Court's decisional process in this significant matter—and are capable of presenting arguments and perspectives to this Court that the parties alone are not capable of presenting, which would assist the Court's deliberations.

13. Granting *Amici* leave to file an *amicus curiae* brief would not impose an undue burden on the Court, given that their proposed brief is within the 7,000 word page limit, and because it will aid the Court's consideration of the issues.

14. No party or its counsel contributed content to this brief or otherwise participated in the brief's preparation.

WHEREFORE, for the reasons set forth herein, *Amici* respectfully request that the Court grant this motion in all respects and permit *Amici* leave to file their attached proposed brief of *amici curiae* in this appeal.

Dated: April 12, 2024
Washington, DC

/s/ Joshua Matz
Joshua Matz

EXHIBIT A

Rule 1250.4 of the Practice Rules of the First Judicial Department of the State of New York provides that motions shall "include a copy of the order, judgment or determination sought to be reviewed, the decision, if any, and the notice of appeal or other document which first invoked the jurisdiction of the court, with proof of filing." *Amici* have made every effort to comply with this rule but have found themselves unable to for two independent reasons.

First, *Amici* seek leave to file an amicus brief in connection with an original Article 78 proceeding filed in the First Department. Accordingly, there is no notice of appeal or order, judgment or determination on review to be included in their motion.

Second, Defendant-Petitioner has filed his Article 78 action under seal and therefore *Amici* are unable to include Defendant-Petitioner's Article 78 petition, or any document that accompanies it, in their filing.

Amici are keen to ensure that their motion and proposed brief comply with this Court's rules. To the extent the Court determines *Amici*'s filing falls short in any respect, *Amici* will swiftly make any change necessary to perfect their amicus filing.

Dated: New York, New York
April 12, 2024

/s/ Joshua Matz

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EXHIBIT B

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INTEREST OF *AMICI CURIAE*

Amici curiae are constitutional scholars, ethics experts, and former public officials committed to upholding the rule of law, protecting fundamental tenets of our democracy, and safeguarding the integrity of the criminal justice system. They submit this brief to assist the Court in its consideration of the issues and to establish that Justice Merchan's order is well grounded in principles of constitutional law.

Following is a complete list of *amici curiae*, with institutional affiliations and former job titles listed for identification purposes only:

- **Donald Ayer**: Deputy Attorney General under President Bush (1989-1990)
- **Ty Cobb**: Special Counsel to the President in the Trump Administration (2017-2018)
- **Tom Coleman**: Congressman from Missouri (1976-1993)
- **Brian Frosh**: Attorney General of Maryland (2015-2023)
- **Stephen Gillers**: Elihu Root Professor of Law Emeritus at NYU Law School
- **Barbara S. Gillers**: Chair of the American Bar Association Standing Committee on Ethics and Professional Responsibility (2017-2020)
- **Philip Lacovara**: Counsel to the Special Prosecutor, Watergate Special Prosecutor's Office (1973-1974)
- **Frederick Lawrence**: Distinguished Lecturer, Georgetown University Law Center
- **John McKay**: U.S. Attorney for the Western District of Washington under President George W. Bush (2001-2007)
- **Alan Charles Raul**: Associate Counsel to the President (1986-1988)

- **Nicholas Rostow**: General Counsel and Senior Policy Adviser to the U.S. Permanent Representative to the United Nations, New York (2001-2005)

- **Claudine Schneider**: Member of the U.S. House of Representatives (R-RI) (1981-1991)

- **Laurence H. Tribe**: Carl M. Loeb University Professor of Constitutional Law Emeritus at Harvard University

- **Olivia Troye**: Special Advisor (Homeland Security and Counterterrorism) to Vice President Mike Pence (2018-2020)

- **Stanley Twardy**: U.S. Attorney for the District of Connecticut (1985-1991)

- **Shan Wu:** Counsel to Attorney General Janet Reno (1999–2000)

- **Ellen Yaroshefsky**: Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra Law School

PRELIMINARY STATEMENT

Several months ago, the U.S. Court of Appeals for the District of Columbia upheld a gag order against Donald J. Trump in a criminal case arising from Trump's efforts to subvert the 2020 election. *See United States v. Trump*, 88 F.4th 990 (D.C. Cir. 2023). That opinion provided a thorough statement of the law that also applies to the gag order entered in this criminal case, which arises from Trump's efforts to improperly influence the 2016 election. Applying the D.C. Circuit's analysis here, Justice Merchan's order is well justified and fully consistent with governing law. Trump's criticism of the order and attempt to evade trial on that basis are meritless.

ARGUMENT

The dispute here concerns the balance between "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 1002. On the one hand, political speech—including speech about active judicial proceedings—is the "lifeblood of American democracy." *Id.* On the other hand, "the public has its own compelling interest 'in fair trials designed to end in just judgments.'" *Id.* at 1003 (citation omitted); *see also id.* at 1004 ("[T]he unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy." (cleaned up)). Judges thus have a "duty to protect trials from outside influence" and to shield "court personnel from both the reality and the appearance of undue outside pressure." *Id.*

To reconcile these principles, courts generally allow parties broad latitude in their public statements—but do not hesitate to impose limits where necessary to safeguard a fair trial. *See id.* at 1003 ("[C]ourts must take steps to protect the integrity of the criminal process, giving freedom of discussion the widest range that is compatible with the essential requirement of the fair and orderly administration of justice." (cleaned up)). That is particularly true when trial participants engage in speech that may prejudice the proceedings. *See id.* at 1005 ("[T]he Constitution affords judges broader authority to regulate the speech of trial participants."). In making such decisions, "courts must be proactive," since "the primary constitutional

duty of the Judicial Branch [is] to do justice in criminal prosecutions." *Id.* at 1004-1005; *see also id.* at 1008 ("Mr. Trump does not have an unlimited right to speak.").

Distilling these points, the D.C. Circuit held that there are three key questions bearing on the entry of a gag order against a criminal defendant: "(1) whether the Order is justified by a sufficiently serious risk of prejudice to an ongoing judicial proceeding; (2) whether less restrictive alternatives would adequately address that risk; and (3) whether the Order is narrowly tailored, including whether the Order effectively addresses the potential prejudice." *Id.* at 1007. We address each in turn.

I. TRUMP'S EXTRAJUDICIAL STATEMENTS POSE A SERIOUS RISK OF PREJUDICE TO THESE CRIMINAL PROCEEDINGS

The first question is whether a gag order is necessary in light of the risk posed by Trump's extrajudicial statements. The D.C. Circuit assumed (without deciding) that "only a significant and imminent threat to the administration of criminal justice will support restricting Mr. Trump's speech." *Id.* at 1008. Applying that standard here, Justice Merchan's order is justified: "The public has a compelling interest in ensuring that the criminal proceeding against Mr. Trump is not obstructed, hindered, or tainted, but is fairly conducted and resolved according to the judgment of an impartial jury based on only the evidence introduced in the courtroom." *Id.* at 1007.

Specifically, the record before Justice Merchan confirms three crucial points: *first*, that Trump has made a regular practice of attacking individuals involved in the civil and criminal cases against him; *second*, that Trump's attacks inevitably result

in a deluge of hate and threats against his targets; and *third*, that Trump's conduct poses several distinct threats to the integrity of the trial proceedings in this matter.

A. Trump Makes a Practice of Attacking Trial Participants

The record is clear that Trump regularly attacks individuals involved in his trial proceedings. Without court-ordered limits on his public statements, there is every reason to believe that he will continue to target witnesses, counsel, court staff, and jurors—and their immediate family—with dreadful consequences for them. In Trump's own words, which he posted online immediately after one his two federal indictments: "IF YOU GO AFTER ME, I'M COMING AFTER YOU!" Aff. & Mem. of Law in Supp. of Mot. for an Order Restricting Extrajudicial Statements ("Colangelo Aff."), Ex. 1 at 17, *New York v. Trump*, Index No. 71543-23 (Feb. 22, 2024).

Witnesses. Trump has repeatedly gone after known and potential witnesses in the cases against him. For instance, in this case, Trump posted on social media that the District Attorney was prosecuting him based on the "now ancient 'no affair' story of Stormy 'Horseface' Danials [sic]," as well as the testimony of Michael Cohen, who Trump described as "a convicted felon, disbarred lawyer, with zero credibility, who was turned down numerous times by me when he asked for pardons."[1] *Id.* at 44.

[1] Trump has also gone after Cohen in connection with a civil matter, calling him a "Sleazebag Lawyer" and accusing him of giving false testimony. Colangelo Aff. Ex. 1 at 28.

And even following the entry of Justice Merchan's order, Trump has again targeted both Cohen and Daniels online, describing them as "two sleaze bags who have with their lies and misrepresentations, cost our Country dearly!" @realDonaldTrump, Truth Social (April 10, 2024, 10:07 AM), https://truthsocial.com/@realDonaldTrump/posts/112247309823361972.

Trump has similarly targeted witnesses in his pending federal prosecution arising from his efforts to overturn the results of the 2020 presidential election. *See Trump*, 88 F.4th 998 ("Mr. Trump also took aim at potential witnesses named in the indictment."). For example, he posted online that former Vice President Michael Pence "has gone to the Dark Side," was "mak[ing] up stories," and was "delusional, and . . . want[s] to show he's a tough guy." Colangelo Aff., Ex. 1 at 59. Trump also attacked former Attorney General William Barr as a "Gutless Pig" and a "disgruntled former employee" who is "weak & totally ineffective." *Id.* at 16. Further, in response to reports that former White House Chief of Staff Mark Meadows may be cooperating with prosecutors, Trump published a statement expressing doubt that "Mark Meadows would lie about the Rigged and Stollen [sic] 2020 Presidential Election merely for getting IMMUNITY against Prosecution (PERSECUTION!) . . . but who really knows." *Id.* at 23. Trump added that people who would make a deal to cooperate were "weakling [sic] and cowards, and so bad for the future [of] our Failing Nation." *Id*.

In the same vein, Trump has made statements targeting witnesses against him in the Fulton County, Georgia criminal prosecution for interference with the 2020 election. For instance, he publicly stated that former Georgia Lieutenant Governor Jeff Duncan "shouldn't" testify against him in those proceedings, calling Duncan a "fail[ure]" and a "loser" who "fought the TRUTH all the way." *Id.* at 6.

Counsel, Court Staff, and their Families. Trump has also made a practice of attacking the lawyers, judges, and court staff involved in the cases against him—and has expanded that practice to include attacks on their immediate family members.

In this very proceeding, Trump has repeatedly attacked the District Attorney, calling him a "Racist, George Soros backed D.A." and claiming he filed charges due to pressure from "the Radical Left Democrats, the Fake News Media, and the Department of Injustice." *Id.* at 47. Trump called the District Attorney "a danger to our Country" and urged that he "should be removed immediately." *Id.* at 53. He further posted, "What kind of person can charge another person … with a Crime, when it is known by all that NO crime has been committed, & also that potential death & destruction in such a false charge could be catastrophic for our Country? Why and who would do such a thing? Only a degenerate psychopath that truely [sic] hates the USA!" *Id.* at 54. In one of Trump's posts, he included a picture of himself holding a baseball bat and wielding it at the back of the District Attorney's head. *Id.* at 56.

Trump has also gone after the presiding judge in this case, denouncing Justice Merchan as "Biased & Conflicted" and saying that if he was allowed to remain "on this Sham 'Case,' it will be another sad example of our Country becoming a Banana Republic." @realDonaldTrump, Truth Social (Mar. 27, 2024, 10:30 AM), https://truthsocial.com/@realDonaldTrump/posts/112168130782172121. Trump also posted that Justice Merchan "is suffering from an acute case of Trump Derangement Syndrome" and that his "daughter represents Crooked Joe Biden, Kamala Harris, Adam 'Shifty' Schiff, and other Radical Liberals." @realDonald Trump, Truth Social (Mar. 27, 2024, 10:31 AM), https://truthsocial.com/@real DonaldTrump/posts/112168132432855508. Trump further (falsely) accused Justice Merchan's daughter of posting an image of Trump behind bars—and claimed that this post therefore "made it completely impossible for [him] to get a fair trial." *Id*. Trump's attacks on Justice Merchan's daughter included posting a photograph of her online. @realDonaldTrump, Truth Social (Mar. 30, 2024, 7:00 PM), https://truth social.com/@realDonaldTrump/posts/112187120801960861.

Such attacks are not an anomaly. In the civil suits filed by E. Jean Carroll—who accused him of sexual assault and defamation—Trump repeatedly attacked U.S. District Judge Lewis Kaplan. *See Carroll v. Trump*, No. 20 Civ. 7311 (S.D.N.Y.). For example, Trump posted on Truth Social that "This Clinton appointed Judge, Lewis Kaplan, hated President Donald J. Trump more than is humanly possible. He is a terrible

person, completely biased." @realDonaldTrump, Truth Social (May 10, 2023, 1:20 AM), https://truthsocial.com/@realDonaldTrump/posts/110342704670441764. More recently, in a rambling post that also criticized Justice Merchan, Trump expanded his public attacks to include pointed references to Judge Kaplan's wife: "[Judge] Kaplan, a Hillary friend, wouldn't even let my lawyers put on a proper case, made it two cases instead of one, took away my American Right to defend myself, and was a Crazed Bully as his wife and friends sat in the Courthouse, every day in their little roped off section, and prodded him on in awe." @realDonaldTrump, Truth Social (April 6, 2024, 1:06 PM), https://truthsocial.com/@realDonaldTrump/posts/112225366117672509.

Trump has also attacked lawyers and court personnel (and their families) in other cases. For example, in the civil case filed by New York Attorney General Letitia James, Trump publicly called the Attorney General "CORRUPT, RACIST, AND INCOMPETENT," assailed Justice Engoron as a "partisan political hack" who was "OUT OF CONTROL," and sharply attacked Justice Engoron's Principal Law Clerk. Colangelo Aff., Ex. 1 at 26, 27, Ex. 16 at 1; *see also* Jonah Bromwich & Alan Feuer, *Trump and Aides Immediately Attack Clerk After Gag Order Is Paused*, N.Y. Times (Nov. 16, 2023). Along similar lines, Trump has called Special Counsel Jack Smith a "thug," a "deranged lunatic," a "psycho," and a "sick and deranged sleazebag," and has publicly targeted Jack Smith's wife for criticism. Colangelo

Aff., Ex. 1 at 10, 11, 12, 13, 14, 15. Trump also referred to the judge overseeing the Special Counsel's prosecution—U.S. District Judge Tanya Chutkan—as a "highly partisan judge" who "obviously wants me behind bars." *Id.* Ex. 1 at 18, 19, 20.

Jurors. Finally, Trump has also targeted jurors. In the Fulton County case, for example, he publicly attacked the foreperson of the grand jury that indicted him. *Id.* Ex. 1 at 4. Trump also publicly called out the jury forewoman in the Roger Stone case, calling her "so harshly negative about the President & the people who support him," and accusing her of failing to disclose "her hatred of 'Trump' and Stone." *Id.* Ex. 1 at 2-3. In light of these risks to jurors from Trump's behavior, Judge Kaplan ordered that the *Carroll* cases be tried before an anonymous jury—an order that even Trump did not oppose. *See, e.g.*, *Carroll v. Trump*, 663 F. Supp. 3d 380 (S.D.N.Y. 2023).

B. Trump's Attacks Frequently and Foreseeably Result in Threats of Violence, Harassment, and Intimidation of Targeted Individuals.

As the D.C. Circuit recognized: "Former President Trump's words have real-world consequences. Many of those on the receiving end of his attacks pertaining to the 2020 election have been subjected to a torrent of threats and intimidation from his supporters." *Trump*, 88 F.4th at 1011; *see also id.* ("Others too have had their lives turned upside down after coming within Mr. Trump's verbal sights.").

There are many examples of this point; we will highlight just a few. To start, federal charges for transmitting interstate threats against public officials have been

brought against several individuals who were provoked by Trump's social media posts. One Utah resident was charged with transmitting interstate death threats against the District Attorney for communications that began just hours after Trump posted on social media. Colangelo Aff., Ex. 10. A separate case was brought against a Texas resident for transmitting interstate death threats against Judge Chutkan after she called chambers to describe Judge Chutkan as a "stupid slave n****r" and to warn that "If Trump doesn't get elected in 2024, we are coming to kill you, so tread lightly, b***h…. You will be targeted personally, publicly, your family, all of it." *Id.* Ex. 8 at 3.

These developments are consistent with the repeated, foreseeable effects of Trump's inflammatory and prejudicial public statements. The Threat Assessment & Protection Unit of the NYPD logged a surge of threats against the District Attorney, his family, and his employees following Trump's social posts about this case. *Id.* Ex. 13. The Unit also responded to two terroristic mailings to the District Attorney around the time that Trump was indicted: one letter included white powder with a note saying "Alvin: I'm going to kill you," and the other (also with white powder) had an image of Trump and the District Attorney with the words "you will be sorry." *Id.* at 5. Special Counsel Jack Smith has similarly reported receiving threats—and one of the prosecutors in his office has been "subject to intimidating communications." *Trump*, 88 F.4th at 1011.

Moreover, following Trump's attacks on Justice Engoron and his clerk, Justice Engoron's chambers were "inundated with hundreds of harassing and threatening phone calls, voicemails, emails, letters, and packages," some of which included death threats, and some of which called the judge and his clerk "Nazi[s]," "dirty Jews," and child molesters. *See New York v. Trump*, No. 452564/2022, NYSCEF No. 1631 at 2 (N.Y. Sup. Ct. Nov. 3, 2023); *Trump v. Engoron*, No. 2023-05859, NYSCEF No. 9, Ex. E at 3–5 (N.Y. App. Div. Nov. 22, 2023). Personal information for Justice Engoron's law clerk was also compromised after Trump's attacks, resulting in dozens of calls, and dozens of social media messages, with "harassing, disparaging comments and antisemitic tropes." Colangelo Aff., Ex. 9 at 2.

The consequences are no less severe for jurors singled out by Trump. Almost immediately following his incendiary posts concerning the Fulton County grand jury proceedings, the jurors' personal identifying information was circulated on far-right websites, requiring a massive police response to protect the jurors from harassment and violence. Colangelo Aff., Ex. 5. And jurors in the Roger Stone case similarly attested that, following Trump's online attacks, they feared right-wing attacks and exposure, and those already singled out had faced harassment and felt unsafe. Colangelo Aff., Ex. 3.

C. Trump's Continued Attacks Pose Three Significant and Imminent Threats to the Integrity of these Active Criminal Proceedings.

In three distinct respects, "Trump's documented pattern of speech and its demonstrated real-time, real-world consequences pose a significant and imminent threat to the functioning of the criminal trial process." *Trump*, F.4th at 1012.

First, Trump's attacks on witnesses and potential witnesses "that concern their potential participation in the criminal proceeding pose a significant and imminent threat to individuals' willingness to participate fully and candidly in the process, to the content of their testimony and evidence, and to the trial's essential truth-finding function." *Id.* Courts have a duty to shield witnesses from influences that could affect their testimony and undermine the integrity of the trial process. *See, e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, 359 (1966); *Estes v. Texas*, 381 U.S. 532, 547 (1965); *see also Trump*, F.4th at 1012-13. Trump can thus be prohibited from directly menacing or interfering with witnesses—a prohibition that "would mean little if he can evade it by making the same statements to a crowd, knowing or expecting that a witness will get the message." *Id.* at 1013. As the D.C. Circuit recognized, "common sense and common human experience teach that hostile messages regarding evidentiary cooperation that are publicly relayed to high-profile witnesses have a significant likelihood of deterring, chilling, or altering the involvement of other witnesses in the case as well." *Id.* (cleaned up). Trump's public statements thus pose a significant, imminent threat to the integrity of testimony by witnesses and potential witnesses.

Second, "certain speech about counsel and staff working on the case poses a significant and imminent risk of impeding the adjudication of the case." *Id.* at 1014. The record is replete with examples of Trump's threats, attacks, and intimidation aimed at counsel and court staff. The record is also clear that this distracts from the trial process and requires a significant diversion of security resources. As the D.C. Circuit remarked, "messages designed to generate alarm and dread, and to trigger extraordinary safety precautions, will necessarily hinder the trial process and slow the administration of justice." *Id.* Indeed, as we have already seen, "trial personnel and participants will be distracted or delayed by objectively reasonable concerns about their safety and that of their family members, as well as by having to devote time and resources to adopting safety measures or working with investigators." *Id.*

This concern applies with full force to Trump's attacks on the family members of court personnel and counsel: "Threats of physical harm, stalking, or doxing almost inevitably will slow or temporarily halt work on the criminal proceeding as personnel are distracted addressing threats to their *or their families'* safety, or to the security of courthouse and office premises." *Id.* at 1026 (emphasis added). For that reason, the D.C. Circuit imposed a gag order—subject to limits mirroring those adopted by Justice Merchan—that encompassed statements about "counsel and staff members, *or their family members*." *Id.* (emphasis added). As Justice Merchan found in his decision below: "[Trump's] pattern of attacking family members of presiding

jurists and attorneys assigned to his cases serves no legitimate purpose. It merely injects fear in those assigned or called to participate in the proceedings, that not only they, but their family members as well, are 'fair game' for [Trump's] vitriol." *New York v. Trump*, Indictment No. 71543-23, Decision and Order, at 2. Simply put, the prejudice caused by attacks on family members "cannot be overstated." *Id.* at 3.

That conclusion is supported by law and common sense. *See Trump*, 88 F.4th at 1014, 1026. Although "working in the criminal justice sphere fairly requires some thick skin," *id.* at 1027, "it is unreasonable to expect a judge to cease being a concerned parent simply because he or she has assumed judicial office," *Matter of Baughman*, 182 W. Va. 55, 56 (1989). Partly for this reason, the federal law that protects federal judges against actual, attempted, or threatened violence also shields their immediate family members. *See* 18 U.S.C. § 115(a). And courts in many contexts have cited the need to protect trial participants' immediate family members. *See, e.g.*, *United States v. Gotti*, 777 F. Supp. 224, 226 (E.D.N.Y. 1991). That is consistent with a broader appreciation—reflected in many provisions of state and federal law—that efforts to intimidate or influence an official can be uniquely concerning when their immediate family members are also involved. *See, e.g.*, NY Elect. Code § 14-206(2)(k); NY Elect. Code § 14-130(2); 11 CFR § 9035.2(a)(1); 11 CFR § 106.3(c)(2); 52 U.S.C. § 30101(26)(c); 52 U.S.C. § 30118(b)(2).

Finally, Trump's statements targeting jurors and prospective jurors "pose a significant and imminent threat to individuals' willingness to participate fully and candidly in the process … and to the trial's essential truth-finding function." *Trump*, 88 F.4th at 1012. As the Supreme Court has emphasized, "trial courts must take strong measures" to ensure that outside influences do not affect the integrity of the jury process. *See* 384 U.S. at 362; *see also Estes*, 381 U.S. at 545. Thus, "one of the most powerful interests supporting broad prohibitions on trial participants' speech is 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." *Trump*, 88 F.4th at 1020. Here, Trump's public statements—several of which targeted grand and petit jurors in other cases—indisputably pose a substantial, imminent threat to the integrity of the jury.

* * * * *

In short, the D.C. Circuit's analysis fits this case like a glove. And so does its conclusion: "Given the record . . . the [trial] 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. Just as a court is duty-bound to prevent a trial from devolving into a carnival, so too can it prevent trial participants and staff from having to operate under siege." *Id.* at 1014 (citations omitted). Simply put, Justice Merchan has a duty to protect both the

integrity of the trial proceedings and the safety of those involved—and he properly upheld that duty by imposing a targeted gag order in response to Trump's conduct.

II. NO LESS-RESTRICTIVE ALTERNATIVES WOULD SUFFICE

Because Justice Merchan's order was "justified by a sufficiently serious risk of prejudice to an ongoing judicial proceeding," the next question is "whether less restrictive alternatives would adequately address that risk." *Trump*, F.4th at 1007. In other words, would anything short of a gag order remedy the risks posed by Trump's prejudicial, extrajudicial statements targeting trial participants and their families?

The answer to that question is "no." Before resorting to a gag order, Justice Merchan (like many other judges overseeing cases against Trump) began with a less restrictive approach. Shortly after Trump was indicted, Justice Merchan admonished Trump not to engage in extrajudicial statements targeting witnesses, counsel, and court staff. *See New York v. Trump*, Indictment No. 71543-23, Decision and Order, at 2 (Mar. 26, 2024). But Trump quickly proved himself unwilling or unable to show self-restraint—just as occurred in the Attorney General's recent civil suit and in the Special Counsel's criminal prosecution in D.C., where gag orders were adopted.

Nor would any other traditional alternative measures suffice. Questioning prospective jurors, instructing the seated jurors to ignore Trump's statements, and moving or postponing the trial would do little to address "the harm to witnesses' participation or to staff beleaguered by threats or harassment." *Trump*, F.4th at 1017.

Moreover, given the national reach of Trump's statements—and the fact that Trump would obviously deploy the same prejudicial strategy in any other forum or at any later court date—shifting the trial in this case "would be counterproductive, create perverse incentives, and unreasonably burden the judicial process." *Id.* at 1018.

III. THE ORDER IS NARROWLY TAILORED

This leaves only the question of whether Justice Merchan's order is narrowly tailored to address the prejudice from Trump's statements. In a word, "yes."

Contrary to some of Trump's rhetoric, Justice Merchan did not issue a blanket prohibition on statements about this case. Instead, consistent with the approach approved by the D.C. Circuit, Justice Merchan carefully tailored his order. With respect to witnesses, his order limits only statements "about known or reasonably foreseeable witnesses *concerning their potential participation in the investigation or this criminal proceeding.*" *New York v. Trump*, Indictment No. 71543-23, Decision and Order, at 3 (Apr. 1, 2024) (emphasis added). The order thus permits Trump to comment on a witness's "books, articles, editorials, interviews, or political campaigns"—and to criticize any such witnesses' past performance in a government position, where applicable. *See Trump*, 88 F.4th at 1021-22. The order also allows Trump to comment on witnesses' credibility and trustworthiness—but limits those otherwise prejudicial comments to the courtroom, not the public sphere. *Id.* at 1022.

In addition, Justice Merchan adopted a narrow limit on Trump's comments about the jury: Trump is forbidden only from "statements about any prospective juror or any juror in this criminal proceeding." *See New York v. Trump*, Indictment No. 71543-23, Decision and Order, at 3 (Apr. 1, 2024). The order does not prohibit his attacks on jurors' qualifications, biases, or ability to serve—rather, it channels them only to *voir dire*, which is the traditional process used to challenge prospective jurors. Given the *voir dire* process, there is no legitimate justification for Trump to single out jurors publicly in social media or campaign rallies. And the awareness that he might do so would be terrifying to any prospective or seated juror in this case.

Finally, Justice Merchan did not restrict any speech concerning himself, the Court, District Attorney Bragg, or the District Attorney's Office, or District Attorney Bragg. *See New York v. Trump*, Indictment No. 71543-23, Decision and Order, at 3 (Apr. 1, 2024). As the D.C. Circuit explained, those institutions and high-ranking officials are generally not entitled to protection from robust criticism. *Trump*, 88 F.4th at 1025-26. And even with respect to the other individuals covered by Justice Merchan's order—counsel and court staff (and family members of counsel, court staff, the District Attorney, and the Court)—his order is narrowly tailored by a *mens rea* requirement: Trump's statements are proscribed only if he acts with "the intent to materially interfere with, or to cause others to materially interfere with, counsel's or staff's work in this criminal case, or … know[] that such interference is likely to

result." *See New York v. Trump*, Indictment No. 71543-23, Decision and Order, at 3 (Apr. 1, 2024). This *mens rea* restriction "best accounts 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." *Id.* at 1026. In all these respects, Justice Merchan's order is narrowly tailored.

Below, Trump raised a single objection: namely, that he was just amplifying defense arguments to recuse Justice Merchan from the case based on certain alleged public statements and clients that Trump attributed to Justice Merchan's daughter.

That position is meritless. Trump's recusal motion reflects frivolous and bad faith contentions that have previously been rejected in this very case. As Justice Merchan highlighted: "The arguments [Trump's] counsel makes are at best strained and at worst baseless misrepresentations which are uncorroborated and rely upon innuendo and exaggeration … To argue that the most recent attacks, which included photographs, were 'necessary and appropriate in the current environment,' is farcical." *New York v. Trump*, Indictment No. 71543-23, Decision and Order, at 3 (Apr. 1, 2024); *see also* Brian Bennett, *Trump's Using Court Filings to Get Around His Gag Order*, Time (Apr. 8, 2024) ("There is a longstanding practice in American courts that a person's views are not defined by those of their family members.").

Indeed, accepting Trump's position would obliterate the vital protections that gag orders exist to provide. Where a defendant's public statements endanger the integrity of the trial proceedings and thus necessitate a gag order, a defendant cannot grant himself an exemption from the gag order by submitting a frivolous or bad faith filing and then claiming that he must be permitted to speak about it publicly. That would put the fox in charge of the hen house. While Trump remains free to raise these arguments in court, publicly attacking and posting photos of Justice Merchan's daughter implicates the court's fundamental duty to protect the integrity of the trial.

Accordingly, the order entered by Justice Merchan appropriately upholds the judicial responsibility to ensure a fair trial—and does not violate Trump's rights, which may be limited by virtue of his status as a defendant in this criminal trial. That order should be affirmed on the merits and, contrary to Trump's position, most certainly offers no basis to stay the trial or otherwise disrupt the proceedings below.

CONCLUSION

For the reasons set forth above, this Court should deny Trump's request to stay the proceedings below based on the entry of a gag order—and should affirm the Decision and Order Restricting Extrajudicial Statements, as well as, the Decision and Order Clarifying or Confirming the Order Restricting Extrajudicial Statements.

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Washington, DC

Respectfully submitted,

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