SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NIAGARA

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In the matter of	:	Index No. _____
TRACY A. MURPHY,		
Petitioner,	:	
For a Judgment Pursuant to Article 78	:	
of the Civil Practice Law and Rules	:	
-against-	:	
JUSTICE BRUCE M. BARNES, TOWN OF NEWFANE COURT	:	
and		
THE PEOPLE OF THE STATE OF NEW YORK,		
Respondents.	:	

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MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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PRELIMINARY STATEMENT

Government suppressions of speech in advance of its actual expression – prior restraints – are "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). And, as social media websites are "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard[,] . . . to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Packingham v. North Carolina*, 582 U.S. 98, 107–08 (2017). Yet, in a one-page order, in a criminal proceeding on a single count of larceny, respondent Newfane Town Court Justice Bruce Barnes does just that. Through imposing this order, Justice Barnes acted in gross excess of his jurisdiction.

The Gag Order[1] at issue here imposes a blanket ban on petitioner Tracy Murphy's use of social media – which the Gag Order defines to "specifically include [F]acebook and public billboards, etc." – while she awaits resolution of the criminal case against her.[2] The Gag Order "with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham*, 582 U.S. at 107. It also cuts off Ms. Murphy's ability to speak publicly in the "vast democratic forums of the Internet" (as well as through outdoor signage) about a public

[1] All defined terms have the same meaning designated in the petition filed accompanying this memorandum.
[2] Ex. A. All references to lettered exhibits refer to the exhibits attached to the petition filed accompanying this memorandum.

controversy at which she and her belief system are at the center. *Reno v. American Civil Liberties Union,* 521 U.S. 844, 868 (1997).

Justice Barnes exceeded the scope of his jurisdiction in imposing the Gag Order in several ways. First, the Gag Order is an unconstitutional prior restraint on speech in violation of the First Amendment to the United States Constitution and Article I, Section 8, of the New York State Constitution. Second, the Gag Order is unconstitutionally vague and overbroad. Finally, the Gag Order – which arose from a non-monetary condition of release another judge imposed on Ms. Murphy at her arraignment – violates New York bail laws.

For these reasons, when he imposed the Gag Order, Justice Barnes exceeded his authority and jurisdiction as a justice of Newfane Town Court. Through this Article 78 proceeding, Ms. Murphy thus seeks a writ of prohibition: (1) vacating the Gag Order and the underlying non-monetary conditions of her release; and (2) forbidding enforcement of the Gag Order and any other restriction of Ms. Murphy's First Amendment rights during the pendency of her criminal case.

BACKGROUND AND PROCEDURAL HISTORY

Petitioner Tracy Murphy founded and operates Asha's Farm Sanctuary ("Sanctuary"), a nonprofit animal shelter located in Newfane, New York.[3] The Sanctuary, a 501(c)(3) nonprofit organization, is home to approximately fifty animals, including goats, cows, pigs, and ducks.[4] Ms. Murphy founded the Sanctuary over a decade ago to provide shelter and care to former farm animals.[5] Ms. Murphy also uses her work through the Sanctuary to advocate for her deeply held beliefs about animal welfare.[6]

[3] *See* Pet. ¶ 14.
[4] *See id.* ¶ 15.
[5] *See id.*
[6] *See id.*

Ms. Murphy is vegan.[7] As part of this belief system, Ms. Murphy does not eat any meat, dairy, or other food derived from animals, and she refrains from using other animal products such as wool and leather.[8] She is passionate about animal welfare and believes that raising animals for food is ethically wrong.[9]

The Gag Order Ms. Murphy challenges in this Article 78 proceeding arises from a pending criminal proceeding in Newfane Town Court, where Ms. Murphy faces one count of petit larceny.[10] On August 2, 2022, Ms. Murphy was arraigned on one count of grand larceny (a charge later reduced to misdemeanor petit larceny).[11] This charge was based on Ms. Murphy's alleged "refus[al] to give back to the owner" two cows belonging to Ms. Murphy's neighbor Scott Gregson.[12]

On or around July 16, 2022, Ms. Murphy discovered two cows on her property.[13] She provided shelter and care for the cows, and, not knowing where they came from, contacted the Niagara County Society for the Prevention of Cruelty to Animals, which serves as the de facto animal control department for Newfane.[14] Ms. Murphy also contacted a local attorney, who advised – as Ms. Murphy understood the advice – that (1) Ms. Murphy possessed a lien on the cows based on her care for the animals and could retain possession of them until that lien was satisfied, and (2) Ms. Murphy should not release the cows to anyone claiming ownership of the animals absent proof of such ownership.[15]

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[7] *See id.* ¶ 16.
[8] *See id.*
[9] *See id.*
[10] *See id.* ¶¶ 17, 32–33.
[11] *See* Pet. ¶ 22; Ex. B at 1.
[12] *See* Pet. ¶ 23; Ex. E at 1, 3.
[13] *See* Pet. ¶ 25.
[14] *See id.* ¶ 26.
[15] *See id.* ¶ 27.

Meanwhile, Mr. Gregson, Ms. Murphy's neighbor and the owner of The McKee Farm, alleges that two of three cows he owns went missing sometime between July 15, and July 16, 2022, and that the cows Ms. Murphy discovered on her property were his.[16] About a week after the cows went missing, Mr. Gregson contacted Ms. Murphy, claiming that the cows belonged to him and requesting that Ms. Murphy give him the cows.[17] Based on the legal advice she received, Ms. Murphy informed Mr. Gregson that she would not give him the cows unless he provided proof of ownership and compensation for Ms. Murphy's care of the animals.[18] Mr. Gregson declined to do so.[19] Ms. Murphy, in turn, declined to give Mr. Gregson the cows absent a warrant mandating she turn them over.[20] Three days later, on July 25, 2022, Ms. Murphy was arrested and charged with one count of grand larceny.[21] The Niagara County District Attorney's office has since amended this charge to petit larceny.[22]

At Ms. Murphy's arraignment on August 2, 2022, Town of Somerset Justice Pamela Rider ordered Ms. Murphy released on her own recognizance, on the condition that she "cease social media posts while [her] case is pending."[23] Ms. Murphy's criminal defense counsel challenged this Initial Gag Order with a motion seeking to amend the conditions of Ms. Murphy's release.[24]

However, on February 21, 2023, respondent Justice Bruce M. Barnes issued an order which not only denied Ms. Murphy's motion challenging the Initial Gag Order, but actually

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[16] *See id.* ¶¶ 24, 28.
[17] *See id.* ¶ 29.
[18] *See id.* ¶ 30.
[19] *See id.* ¶ 31.
[20] *See id.*
[21] *See id.* ¶ 32; Ex. B.
[22] *See* Pet. ¶ 32; Ex. E at 1.
[23] *See* Pet. ¶ 34; Ex. B at 1, 4 ("Initial Gag Order").
[24] *See* Pet. ¶ 35; Ex. C.

expanded the scope of the Initial Gag Order.[25] The Initial Gag Order instructed Ms. Murphy to "cease social media posts while [her] case is pending."[26] Justice Barnes' February 2023 Gag Order banned not just any *posts* on social media, but any *use* of social media whatsoever.[27] The Gag Order also adds "public billboards" as a category of "social media" from which Ms. Murphy is banned.[28] The substance of the Gag Order in full orders "Ms. Murphy not to use social media, which would specifically include [F]acebook and public billboards, etc. while her case is still pending in Justice Court."[29] As rationale for this decision, Justice Barnes stated that "Ms. Murphy has been in violation of her release all along," and that "[s]he [h]as been using various mediums to raise money, and she [c]ontinues to do so."[30] The Gag Order cites no supporting caselaw or statutes.[31]

On May 11, 2023, Ms. Murphy's criminal defense counsel filed a motion in the County Court to remove the criminal matter from Newfane Town Court to a superior court.[32] The motion remains pending. In the meantime, Ms. Murphy is still subject to the Gag Order.

ARGUMENT

I. THE GAG ORDER IS AN UNCONSTITUTIONAL PRIOR RESTRAINT

The Gag Order is an unconstitutional prior restraint on speech in violation of the First Amendment to the United States Constitution and Article I, Section 8 of the New York State Constitution.[33] The First Amendment rarely tolerates prior restraints. On the other hand, the

[25] *See* Pet. ¶¶ 40–43; Ex. A.
[26] Ex. B at 1, 4.
[27] Ex. A.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *See* Pet. at 6, n.4.
[33] The speech protections of the New York State Constitution's free speech clause are often even broader than those of the U.S. Constitution. *See Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d

First Amendment provides robust protection to the rights of individuals to access and use social media. Justice Barnes made no attempt to show – nor could he have shown – that *any* gag order on Ms. Murphy (let alone the blanket ban of the challenged Gag Order) is permissible in light of the First Amendment's hearty protection of social media use and distaste for prior restraints. Moreover, any claim that the Gag Order is necessary to ensure an untainted jury pool falls flat. This argument fails given the Gag Order's overbreadth, as well as the fact that the Gag Order applies only to Ms. Murphy, and not the alleged victim in her criminal case, members of the press, or anyone else in the Newfane community or elsewhere exercising their First Amendment rights in connection with Ms. Murphy's criminal case. The Gag Order is thus an unconstitutional prior restraint and Justice Barnes acted in excess of his jurisdiction when he imposed it.

A. The First Amendment Protects Social Media Use and the Display of Signs and Billboards

The Gag Order infringes on a broad array of First Amendment-protected conduct. "[T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Packingham*, 582 U.S. at 107–08. The First Amendment also clearly protects Ms. Murphy's right to post billboards with a message of her choosing. *See Okwedy v Molinari*, 333 F3d 339, 340 (2d Cir. 2003) (reversing dismissal of organization's First Amendment challenge to government official's involvement in removal of organization's billboard based on billboard's anti-LGBTQ message). Fundraising for Asha's Farm Sanctuary, another activity the Gag Order impacts, also falls under the First Amendment's umbrella. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980)

235, 249 (1991) (quoting *O'Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 529 n.3 (1988)). The Gag Order is an unconstitutional prior restraint under both free speech provisions: federal and state.

("[C]haritable appeals for funds . . . involve a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment.").

Given the breadth of the Gag Order and the significantly broader umbrella of protections the First Amendment confers on activities the Gag Order limits, the Gag Order suppresses Ms. Murphy's First Amendment rights from several angles.

B. The Gag Order Prohibiting All Social Media Use Is an Unconstitutional Prior Restraint

Prior restraints – government suppressions of speech in advance of its actual expression – are "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n*, 427 U.S. at 559. Such limitations on speech "bear a heavy presumption of constitutional invalidity which may only be overcome upon a showing of a 'clear and present danger' of a serious threat to the administration of justice." *Matter of Nat'l. Broadcasting Co., Inc. v. Cooperman*, 116 A.D.2d 287, 290 (2d Dep't 1986) (citing *Bridges v. California*, 314 US 252, 263 (1941); *Matter of Oliver v. Postel*, 30 N.Y.2d 171, 180 (1972)).

As the Gag Order bars Ms. Murphy prospectively from engaging in First Amendment-protected activity, it constitutes a prior restraint. Justice Barnes made no attempt to justify *any* gag order on Ms. Murphy, let alone the expanded Gag Order he imposed. *See* Pet. ¶¶ 40–43; Ex. A. Nor could he have, for the reasons discussed below.

C. The Gag Order Cannot Be Justified as Necessary to Ensure an Impartial Jury Trial

In briefing on the Initial Gag Order in the criminal matter, the People likened the Initial Gag Order to gag orders imposed on parties and counsel ahead of certain high-profile criminal trials (and frequently struck down or narrowed on First Amendment grounds). *See* Pet. ¶¶ 37–38; Ex. D ¶ 13 ("Should defendant be allowed to post on social media specifically about this

case, she could taint the jury pool."). But this analogy falls flat, as applied to both the Initial Gag Order and the (even broader) Gag Order challenged in this proceeding, for two key reasons: (1) the applicability of the Gag Order to Ms. Murphy alone; and (2) the scope of the Gag Order.

New York courts regularly strike down gag orders which are significantly *narrower* than the Gag Order here.[34] When it comes to "[a] prior restraint on constitutionally protected expression, even one that is intended to protect a defendant's Sixth Amendment right to trial before an impartial jury," the restraint sought must satisfy an exacting standard to overcome the "heavy presumption against its constitutional validity." *United States v. Salameh*, 992 F.2d 445, 446–47 (2d Cir. 1993) (citing *Nebraska Press Ass'n*, 427 U.S. at 570) (holding blanket gag order prohibiting attorneys from making any statements to the press that "have anything to do with this case" was unconstitutional prior restraint). A gag order prohibiting parties to a case and their attorneys from making extrajudicial statements about the action will not withstand First Amendment scrutiny unless the party seeking an order can "me[e]t their burden of demonstrating

[34] *See, e.g.*, *Cleveland v. Perry*, 175 A.D.3d 1017, 1019 (4th Dep't 2019) (reversing trial court order prohibiting all parties and attorneys from making extrajudicial statements about action or underlying facts in public forum or to media); *Matter of Wittek v. Cirigliano*, 177 A.D.2d 610 (2d Dep't 1991) (granting Article 78 petition and blocking enforcement of "rulings and order restraining the media from reporting with respect to the proceedings which occurred in open court," as they "violate the prohibition against prior restraints embodied in the First Amendment of the United States Constitution"); *New York Times Co. v. Rothwax*, 143 A.D.2d 592 (1st Dep't 1988) (granting Article 78 petition brought by news media and criminal defendant to vacate gag order prohibiting attorneys from "in any way discuss[ing] this case or any subject aspect thereof, or decision relating thereto with the press or media," with the exception of discussions about "the schedule of proceedings" and "what witnesses are going to be called"); *Nat'l. Broadcasting Co.*, 116 A.D.2d at 288 (granting Article 78 petition seeking to prohibit enforcement of gag order prohibiting any counsel involved in criminal action from communicating with members of news media on matters related to case); *Matter of Hays v. Marano*, 114 A.D.2d 387, 389 (2d Dep't 1985) (granting Article 78 petition seeking to prohibit enforcement of order restraining publication of confidential grand jury testimony); *Doe v. Zeder*, 5 Misc. 3d 574, 579–82 (Sup. Ct., Onondaga Cty., Sept. 23, 2004) (denying request for gag order restraining opposing party and counsel from "talking about, or distributing materials or documents concerning this case with any members of the media").

that such statements present a reasonable likelihood of a serious threat to defendants' right to a fair trial," and "that less restrictive alternatives would not be just as effective in assuring the defendants a fair trial." *Cleveland*, 175 A.D.3d at 1019 (cleaned up). "Inasmuch as alternative remedies such as a searching voir dire and emphatic jury instructions would be sufficient to mitigate the prejudice to defendants and protect their right to a fair trial," a gag order is not permissible. *Id.*

The Gag Order challenged here comes nowhere close to this standard, as evident from Justice Barnes' utter lack of findings to support the Gag Order and the abundance of New York cases striking down gag orders which were significantly narrower than the one challenged here. *See* Footnote 31. Two additional factual distinctions doom the Gag Order as an unconstitutional prior restraint: (1) its applicability to Ms. Murphy alone; and (2) its scope.

First, the Gag Order restricts the speech of only Ms. Murphy herself, not counsel in her criminal case, witnesses in the case, or the press. *See* Ex. A. To be clear, Ms. Murphy objects to any form of gag order in her criminal case. However, the fact that the Gag Order currently in place applies only to *Ms. Murphy's* First Amendment activities negates the validity of any claim that the Gag Order is necessary to guarantee her right to a fair trial. *See Matter of Hays v. Marano*, 114 A.D.2d 387, 389 (2d Dep't 1985) ("[S]ince the 'gag' order was directed at petitioner alone, it would not have been an effective means to [e]nsure a fair trial because other members of the media were free to report on the proceedings based upon petitioner's research") (citation omitted); *Barker v. Victorious Life Christian Church*, 72 Misc. 3d 898, 899, 901–02 (Sup. Ct., Albany Cnty., June 24, 2021) (denying defendant's request for gag order restricting speech of plaintiff and plaintiff's counsel about case on First Amendment grounds, and pointing out that "plaintiff is not alone in making the type of statements to the press about which the

defendants now complain," given that defendant had "made use of the press to advance his own view of th[e] action").

Second, the Gag Order's scope extends far beyond the confines of her criminal case, as discussed in detail in the following Section. An overbroad Gag Order is necessarily *not* the least restrictive alternative available. *See Cleveland*, 175 A.D.3d 1019.

II. THE GAG ORDER IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD

The Gag Order is independently invalid because it is unconstitutionally vague and overbroad. The Gag Order is unconstitutionally vague because it fails to put Ms. Murphy – or any ordinary person – on notice of what conduct it actually prohibits. The Gag Order is also unconstitutionally overbroad, because its complete ban of *any* social media use across *all* social media platforms (plus public billboards) extends far beyond its legitimate sweep—its "legitimate sweep" being essentially nonexistent given the circumstances.

A. The Gag Order Is Unconstitutionally Vague Because It Fails to Give an Ordinary Person Fair Notice of the Conduct It Prohibits

A statute or court order is void for vagueness if it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *See Johnson v. United States*, 576 U.S. 591, 595 (2015) (citation omitted). "The void-for-vagueness doctrine 'embodies a "rough idea of fairness"' . . . and an impermissibly vague ordinance is a violation of the due process of law." *Matter of Turner v. Mun. Code Violations Bur. of City of Rochester*, 122 A.D.3d 1376, 1377 (4th Dep't 2014) (citations omitted). When it comes to regulations of speech, vagueness is "especially intolerable," due to the chilling effect of such regulations. *People v. Dietze*, 75 N.Y.2d 47, 53 (1989).

The Gag Order instructs "Ms. Murphy not to use social media, which would specifically include [F]acebook and public billboards, etc. while her case is still pending in Justice Court."

Ex. A. For the ordinary person – indeed, even for an exceptionally bright individual – this single sentence raises more questions than it answers about what conduct is permitted and what is prohibited under the Gag Order. For instance, what constitutes "use" of social media? Does Ms. Murphy "use" social media if she opens the Instagram application on her phone and scrolls through her feed, or is "use" limited to posting? And if "public billboards" are considered "social media" for purposes of the Gag Order, what else might "social media" encompass? If a "public billboard[]" constitutes "social media," what about yard signs for local elections? Can Ms. Murphy use an online fundraising platform like GoFundMe, which allows users to post updates and comments? Can she use LinkedIn to check a prospective intern's professional references? What about holding a sign at a protest?

The Gag Order does not answer any of these questions, such that it fails to give an ordinary person fair notice of what conduct is prohibited and subject to punishment. The Gag Order is therefore void for vagueness.

B. The Gag Order Is Unconstitutionally Overbroad Because of Its Broad Scope and Lack of Any Legitimate Sweep

A law or court order is unconstitutionally overbroad if it punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Like vagueness, the overbreadth doctrine is concerned in part with potential chilling effects, where overbroad laws may prompt some individuals "to abstain from protected speech, . . . harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). To determine whether a challenged law or order is unconstitutionally overbroad, courts typically proceed in a two-part analysis. First, a court construes the challenged provision to determine its scope. *United States v. Williams*, 533 U.S. 285, 293 (2008). After making this initial

determination, courts then assess whether the challenged provision, as construed, covers a "substantial amount" of activity protected by the First Amendment. *Id.* at 297.

The Gag Order's scope is a total ban on *any* social media use across *all* social media platforms (plus public billboards). It is not limited to speech about Ms. Murphy's case. It is not limited to speech directed to specific individuals. It is not limited to certain social media platforms. In other words, the Gag Order's scope is vast.

The legitimate sweep of a Gag Order against Ms. Murphy in this case, on the other hand, is essentially non-existent at this time. As discussed in Section I above, on the record currently before the Newfane Town Court, any gag order against Ms. Murphy in this case would be an unconstitutional prior restraint. Given this mismatch, the Gag Order's scope punishes far beyond a "substantial amount" of protected free speech in relation to its (nonexistent) legitimate sweep. The Gag Order is therefore unconstitutionally overbroad.

III. THE GAG ORDER VIOLATES NEW YORK STATE LAW AS AN IMPERMISSIBLE NON-MONETARY CONDITION OF BAIL

Finally, the Gag Order – which arose from a non-monetary condition of release another judge imposed at Ms. Murphy's arraignment, *see* Pet. ¶ 34 – violates the New York bail laws in effect at the time of Ms. Murphy's arrest.[35] *See* CPL §§ 500.10(3a), 510.10(1), 510.10(3), 510.30(1), 530.20(1)(a), 530.30(1) (2022). These laws, as relevant here, only permit non-monetary conditions of release upon a specific finding that release upon recognizance will not reasonably assure a defendant's return to court. Justice Barnes made no such finding, nor does the Gag Order satisfy the narrow conditions under which non-monetary of release are permitted under New York law.

[35] Various amendments to New York's bail laws took effect June 1, 2023. Ms. Murphy relies on the bail laws in effect at the time she was arrested in July 2022.

A. The Newfane Town Court Could Only Impose Non-Monetary Bail Conditions if It Determined Ms. Murphy Was a Flight Risk

When a criminal action is pending in a local criminal court such as the Newfane Town Court and the defendant is charged with a non-qualifying offense,[36] a court must release the defendant pending trial on the defendant's own recognizance, "unless the court finds on the record or in writing that release on the principal's own recognizance will not reasonably assure the principal's return to court." CPL § 530.20(1)(a) (2022). *See also* § 500.10(3a), 510.10(1), 510.30(1) (2022). Here, the Newfane Town Court made no such finding in imposing the Initial Gag Order or the later Gag Order challenged in this proceeding.[37] Even in briefing on the Initial Gag Order motion in the criminal matter, the People failed to advance any argument that Ms. Murphy is at risk of not returning to court for future appearances.[38] Thus, since the record is devoid of any evidence the Town Court considered Ms. Murphy a flight risk, she should have been released on her own recognizance, with no conditions on her release.

B. Even if Ms. Murphy Was a Flight Risk, the Court Could Only Have Imposed the Least Restrictive Conditions Available to Reasonably Assure Her Return to Court

Even if the criminal court *had* found Ms. Murphy was a flight risk – a finding which it did not make – it could have only imposed non-monetary conditions of release that were "the least restrictive alternative and conditions that will reasonably assure [Ms. Murphy's] return to court." CPL § 530.20(1)(a) (2022). *See also* CPL §§ 510.10(3), 510.10(1) (2022). The court would have been required to "explain its choice of alternative and conditions on the record or in

[36] Ms. Murphy was initially charged with grand larceny in the third degree, pursuant to Penal Law Section 155.35, which is a class D felony and not a qualifying offense as defined in CPL Section 530.20(1)(b) (2022). *See* Ex. B. Petit larceny, the amended charge against Ms. Murphy, is also not a qualifying offense. *See* Ex. A at 1; CPL § 530.20(1)(b) (2022).
[37] *See* Ex. A; Ex. B.
[38] *See* Ex. D.

writing," taking into account several factors such as Ms. Murphy's (nonexistent) criminal conviction record and any history of fleeing to avoid criminal prosecution. *Id.* Unauthorized conditions of release must be stricken. *See People ex rel. Shaw v. Lombard*, 95 Misc. 2d 664, 667 (Sup. Ct., Monroe Cnty., July 26, 1978) (finding 8:00pm curfew, where curfew was implemented as form of preventative detention, was illegal as release condition).

Here, no such findings were made, either when the Initial Gag Order was imposed or when Justice Barnes issued the broader Gag Order challenged here. The Initial Gag Order is handwritten on a preprinted securing order form, which reads: "Pursuant to CPL § 510.10(1), the Court has determined on the basis of available information the least restrictive kind and degree of control or restriction that is necessary to secure the defendant's return to court when required is (*check one)*." Ex. B at 4. Justice Rider checked "Other conditions," and handwrote: "cease social media posts while case is pending." *Id.* Justice Rider gave none of the explanation required under New York's bail laws about how this condition was the least restrictive option available to ensure Ms. Murphy's return to court. This process repeated itself in February 2023 when Justice Barnes enacted the even broader Gag Order in response to Ms. Murphy's Initial Gag Order Motion. Ex. A. Justice Barnes provided no rationale connecting the expanded Gag Order, or even the Initial Gag Order, to Ms. Murphy's flight risk. Moreover, logically, the Gag Order bears no connection to the assurance that Ms. Murphy will return to court.

Here, Ms. Murphy presents no flight risk. Even if she did, the Gag Order would not be the least restrictive condition necessary to ensure her return to court when required. Thus, the Gag Order is unauthorized under New York's bail laws.

CONCLUSION

For all of the foregoing reasons, Petitioner Tracy Murphy respectfully requests that this Court grant its petition and: (1) vacate the Gag Order and the underlying non-monetary

conditions of Ms. Murphy's release; (2) prohibit enforcement of the Gag Order and any other restriction of Ms. Murphy's First Amendment rights during the pendency of her criminal case; (3) award Ms. Murphy reasonable attorney's fees and litigation costs pursuant to CPLR § 8601; and (4) award Ms. Murphy such further relief as the Court deems just and proper.

Dated: June 21, 2023
Ithaca, NY

Respectfully submitted,

CORNELL LAW SCHOOL

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CERTIFICATION OF WORD COUNT

I hereby certify that the word count of this memorandum of law complies with the word limits of 22 New York Codes, Rules and Regulations § 202.8-b(a). According to the word-processing system used to prepare this memorandum of law, the total word count for all printed text exclusive of the material omitted under 22 N.Y.C.R.R. § 202.8-b(b) is 4,613 words.

Dated: June 21, 2023

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