SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NIAGARA

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In the matter of	:	Index No. E180218 / 2023
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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REPLY MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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ARGUMENT

In their response to Petitioner Tracy Murphy's Article 78 petition, the People[1] make no attempt to defend the blanket Gag Order Ms. Murphy challenges in this proceeding. *See* Dkt. 12. Specifically, the People acknowledge that the Gag Order barring Ms. Murphy from any use of "social media, which would specifically include [F]acebook and public billboards, etc.," Dkt. 3, while she awaits trial on a misdemeanor larceny charge is a prior restraint on speech bearing a "heavy presumption against its constitutional validity," *see* Dkt. 12 ¶¶ 12, 18–22. The People do not challenge Ms. Murphy's claims that the Gag Order fails to overcome this presumption of unconstitutionality or that the Gag Order is unconstitutionally vague and overbroad. Nor do the People defend the Gag Order as an appropriate nonmonetary condition of bail.

Instead, the People ask this Court to "enforce the [G]ag [O]rder to the extent that it prohibits [Ms. Murphy] from posting specifically about this case." Dkt. 12 at 5. But, for the reasons explained below, even a case-specific gag order as the People propose would be constitutionally infirm.

The People accept that a case-specific gag order would constitute a prior restraint on speech subject to the same heavy presumption against constitutional validity as the blanket Gag Order. *See* Dkt. 12 ¶¶ 18–22. However, the People claim to overcome this presumption of unconstitutionality with a general "concern[]" – based on nothing more than sheer conjecture – that any social media posts by Ms. Murphy could lead to other individuals making threats against the complainant in the criminal case against Ms. Murphy. *See id.* ¶¶ 21–22. This general concern is far from sufficient to justify continued expansive suppression of Ms. Murphy's ability to utilize social media websites – "perhaps the most powerful mechanisms

[1] All defined terms have the same meaning designated in the petition filed in this matter. *See* Dkt. 1.

available to a private citizen to make his or her voice heard," *Packingham v. North Carolina*, 582 U.S. 98, 107–08 (2017) – to speak publicly in the "vast democratic forums of the Internet" about a public controversy at which she and her belief system are at the center, *see Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997).

I. A NARROWED GAG ORDER RESTRICTING MS. MURPHY'S ABILITY TO SPEAK ABOUT HER CASE ON SOCIAL MEDIA WOULD STILL BE AN UNCONSTITUTIONAL PRIOR RESTRAINT

The alternative gag order the People propose – a ban on Ms. Murphy's ability to post on social media about the criminal case against her – fails for two independent reasons to overcome the "heavy presumption against its constitutional validity" as a prior restraint. First, the People rely on sheer speculation and conjecture to justify their proposed case-specific gag order. These justifications fall far short of the narrow circumstances in which prior restraints may be tolerated. Second, even if the People could demonstrate a likelihood that Ms. Murphy's posts would lead to a "clear and present danger" of some "serious substantive evil," the People's proposed case-specific gag order would still not be narrowly tailored to the exact needs of the case. For these reasons, this Court should decline to adopt the People's proposed case-specific gag order and instead vacate the Gag Order against Ms. Murphy in its entirety.

A. Sheer Conjecture and Speculation Are Not Sufficient to Overcome the Presumption Against the Constitutional Validity of a Prior Restraint

The People rely on sheer conjecture and speculation to justify their proposed gag order banning Ms. Murphy from posting on social media about her criminal case. This hypothesizing comes nowhere close to the required showing that Ms. Murphy's ability to post about her case is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." *See Rosenberg Diamond Dev. Corp. v. Appel*, 290 A.D.2d 239 (1st Dep't 2002) (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949))

(vacating injunction prohibiting dissemination of false or libelous material). This "clear and present danger of a serious substantive evil" standard is a high bar: even speech which "stir[s] people to anger, invite[s] public dispute, or br[ings] about a condition of unrest" falls short of the standard. *See Terminiello v. City of Chicago*, 337 U.S. 1, 4–5 (1949). Moreover, such danger must be "likely." *Rosenberg Diamond*, 290 A.D.2d 239. It is not enough to predicate a prior restraint "upon surmise or conjecture that untoward consequences may result," *New York Times Co. v. United States*, 403 U.S. 713, 725-726 (1971) (Brennan, J., concurring). *See also CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (noting United States Supreme Court "previously ha[s] refused to rely on such speculative predictions" about harm that "could" occur in absence of prior restraints, "as based on factors unknown and unknowable").

The People argue that a gag order barring Ms. Murphy from posting about her case is justified because of threats third parties allegedly made against Scott Gregson, the complainant in the petit larceny case against Ms. Murphy, prior to imposition of the Initial Gag Order. Dkt. 12 ¶¶ 21–22. But the People fail to draw a plausible connection between any such threats and any posts Ms. Murphy has made or is likely to make on social media.[2] The People's proposed gag order therefore cannot withstand scrutiny.

Notably, the People do not allege that Ms. Murphy had anything to do with these previous threats: they do not claim that she made any threats herself, nor do they claim that Ms. Murphy directed anyone else to visit Mr. Gregson's property or threaten him and his family. The People do not point to any specific social media posts by Ms. Murphy that they allege gave rise to these threats, nor do they account for extensive outside coverage of the case in the press and

[2] Nor could this Court draw any such connections, since, as noted below, the People have failed to present any evidence about these threats such as when they were made or who made them, or about specific social media posts by Ms. Murphy that the People claim led to any such threats.

elsewhere on social media. Rather, the People make only a vague assertion that Mr. Gregson received violent threats by voicemail "[w]hen this case began," and claim – without presenting any supporting evidence – that the Initial Gag Order "quieted these threats." *Id.* ¶ 21. Looking ahead, the People claim summarily that they are "concerned that should [Ms. Murphy] be allowed to post again on social media about this case, those threats would again occur." *Id.* This sheer speculation about the possibility of social media posts by Ms. Murphy specifically – amid a sea of external coverage and discussion about her case – leading to future threats against Mr. Gregson fails to meet the "exacting" standard required to overcome the heavy presumption against the validity of a prior restraint. *See United States v. Salameh*, 992 F.2d 445, 446–47 (2d Cir. 1993); *Rosenberg Diamond Dev. Corp. v. Appel*, 290 A.D.2d 239 (1st Dep't 2002). This Court should therefore decline to adopt the People's proposed case-specific gag order and instead vacate the Gag Order against Ms. Murphy in its entirety.

B. The People's Proposed Gag Order Is Not Narrowly Tailored

Even if the People could demonstrate a likelihood that social media posts by Ms. Murphy about her case would create a "clear and present danger of a serious substantive evil," the People's proposed case-specific gag order would still not be narrowly tailored to the exact needs of the case. For this independent reason, it does not survive constitutional scrutiny. As the People acknowledge, Dkt. 12 ¶ 20, a prior restraint of speech "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted," and "must be tailored as precisely as possible to the exact needs of the case," *Karantinidis v. Karantinidis*, 186 A.D.3d 1502, 1503 (2020) (citations omitted). The People's proposed gag order, which would ban Ms. Murphy from posting anything concerning her criminal case to any form of social media, fails to

satisfy this tailoring requirement.[3] Under the People's proposed gag order, Ms. Murphy would be barred from even posting the dates of her trial on Facebook, or from referencing the pending criminal case in posts fundraising for her criminal defense needs and her animal sanctuary. The People's proposed gag order fails to distinguish between posts updating Ms. Murphy's contacts about the case and posts calling for violence against Mr. Gregson or disclosing private information putting his family at risk of violence (neither of which Ms. Murphy has done or would condone). As discussed in Ms. Murphy's initial brief in support of her petition, New York courts regularly strike down gag orders which are significantly narrower than the Gag Order Ms. Murphy challenges, and many of which are also narrower than the gag order the People propose. *See* Dkt. 8 at n.34.[4] A gag order banning Ms. Murphy from any social media posts about her case, though narrower than the blanket Gag Order, is still far from being "tailored as precisely as possible to the exact needs of the case"—particularly where, as here, the petit larceny case against Ms. Murphy does not warrant any restrictions on her speech.

CONCLUSION

For these reasons and the reasons addressed in Petitioner Tracy Murphy's opening brief in support of her petition, Ms. Murphy respectfully requests that this Court grant her 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

[3] The People's proposed gag order would also be unconstitutionally vague and overbroad, for reasons addressed in Ms. Murphy's opening brief. *See* Dkt. 8 at 10–12.

[4] The two cases the People cite in which a court upheld *any* portion of a prior restraint are both family law cases involving non-disparagement orders common to the family law context (and frequently narrowed or struck down in that setting). *See* Dkt. 12 ¶¶ 18, 19 (citing *Karantinidis v. Karantinidis*, 186 A.D.3d 1502, 1503–04 (2d Dep't 2020); *id.* ¶ 22 (citing *Walsh v. Russell*, 214 A.D.3d 890, 891 (2d Dep't 2023). In both cases, the reviewing court narrowed the family court's initial gag order, yet left in place aspects of the challenged gag orders given interests unique to family court—interests not at play here, in the criminal context.

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: August 4, 2023
Ithaca, NY

Respectfully submitted,

CORNELL LAW SCHOOL

FIRST AMENDMENT CLINIC[5]

by: __/s/ *Christina N. Neitzey*____

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[5] Cornell Law School First Amendment Clinic legal interns Eman Naga and Kárem Herrera assisted in drafting this brief, under the supervision of attorney Christina Neitzey.

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 1,770 words.

Dated: August 4, 2023

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