

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	
Plaintiff,	.	CR No. 23-0257 (TSC)
	.	
v.	.	
	.	
DONALD J. TRUMP	.	Washington, D.C.
	.	Monday, October 16, 2023
Defendant.	.	10:02 a.m.
.	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE TANYA S. CHUTKAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	MOLLY G. GASTON, ESQ. THOMAS WINDOM, ESQ. U.S. Attorney's Office 601 D Street NW Washington, DC 20530
For Defendant:	JOHN F. LAURO, ESQ. GREGORY M. SINGER, ESQ. Lauro & Singer 400 North Tampa Street 15th Floor Tampa, FL 33602
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1 P R O C E E D I N G S

2 THE DEPUTY CLERK: Good morning, Your Honor. This is
3 criminal case No. 23-257, United States of America versus
4 Donald J. Trump.

5 Counsel, please approach the lectern and state your
6 appearances for the record.

7 MS. GASTON: Good morning, Your Honor. Molly Gaston
8 and Thomas Windom for the United States, and with us at
9 counsel table is Special Agent Jamie Garman.

10 THE COURT: Good morning.

11 MR. LAURO: Good morning, Your Honor. John Lauro on
12 behalf of President Trump, and with me is my partner, Greg
13 Singer.

14 MR. BLANCHE: And good morning, Your Honor. Todd
15 Blanche on behalf of President Trump. I'm joined by two folks
16 from my office, Emil Bove and Stephen Weiss. Good morning.

17 THE COURT: Good morning. All right. We are here for
18 a hearing on the government's opposed motion to ensure that
19 extrajudicial statements do not prejudice these proceedings.
20 And that was ECF 57. I granted leave for the government to
21 file that motion partially under seal to redact identifying
22 information for certain individuals named in the motion. The
23 motion asks for two things:

24 First, an order restricting out-of-court statements.
25 Sometimes it's referred to as a gag order. Specifically an

1 order prohibiting the parties, all parties, from making or
2 authorizing statements to the media or in public settings,
3 including through social media, that pose a substantial
4 likelihood of material prejudice to this case.

5 Such statements include but are not limited to, (a),
6 statements regarding the identity, testimony, or credibility
7 of prospective witnesses, and (b), disparaging and
8 inflammatory or intimidating statements about any party,
9 witness, attorney, court personnel or potential jurors. The
10 defendant is also prohibited from causing surrogates to make
11 such statements on his behalf.

12 Second, the government seeks a court order establishing
13 rules for any pretrial surveys of the jury pool. In
14 particular, the proposed order would require that the parties
15 notify me before conducting any survey, including (a) a brief
16 description of the intended methodology; (b) all questions
17 that will be asked in the pretrial survey, poll, or study; and
18 (c), the expected number of participants.

19 The parties could not begin the survey until I approved it,
20 possibly with my own modifications. And the parties would be
21 required to record the name and address of each participant
22 contacted and submit them to the Court two weeks before jury
23 selection.

24 So I would like to address these issues in reverse order
25 today, because I think the issue of survey requirements will

1 be a simpler one to resolve. As an initial matter, the
2 parties seem to agree that I have some authority to review
3 pretrial surveys as necessary to protect the integrity and
4 the fairness of these proceedings. For example, *United States*
5 *v. Collins*, 972 F.2d 1385 at 1398.

6 But they don't cite to anything definitively setting a
7 standard for that review or offering guidance as to how I
8 should go about it, perhaps because judicial supervision of
9 surveys appears to be relatively unusual and so the law is not
10 very developed.

11 Ultimately, however, that may not matter very much here
12 because I see little reason to impose much in the way of
13 survey requirements. At the hearing that we held on August 28
14 of this year, the defense agreed when I asked to submit an ex
15 parte notice before it conducted a survey. And in its
16 opposition brief the defense states that it has no objection
17 to informing the Court of the dates and sample sizes of its
18 polling in the District of Columbia.

19 So, Ms. Gaston, are you going to be speaking for the
20 government? So why isn't that sufficient at this point?

21 MS. GASTON: Your Honor, if the Court believes that
22 that is sufficient, then that is sufficient for the
23 government. Really, our position was -- what we proposed was
24 what we thought might be helpful to the Court in discerning
25 whether the questions posed in the course of any such study

1 might prejudice the jury pool. But if the Court feels that
2 what the Court has already done is sufficient, then that is
3 sufficient for the government.

4 THE COURT: All right. Thank you.

5 So I think the defense agreement to notify the Court of
6 their intent to conduct a survey and the dates and sample
7 sizes of the proposed survey is enough for the moment. So I'm
8 going to deny the government's motion as to that point. I
9 don't see the need for anything more. As the defense points
10 out, a survey's sample size would ordinarily include only a
11 few hundred people, which means it would not meaningfully
12 affect public opinion even if the questions were somewhat
13 slanted.

14 Likewise, there's a low probability that anyone polled
15 would end up in the jury venire, and if they were, a voir dire
16 question would reveal that. So unless the defense tries to
17 poll 100,000 people or something, I don't foresee any issues
18 with it conducting surveys, just provided you abide your
19 representation that you let the Court know.

20 Now, of course, if the defense later chooses to rely on the
21 results of surveys to, for example, move for a change of
22 venue, then I may need to review the survey methodology in
23 greater detail, including the wording of the questions asked.
24 But that's not a reason for me to preemptively prevent or
25 micromanage defense's surveys. So the motion is denied as it

1 pertains to additional survey requirements.

2 Now we go on to the government's request for an order
3 governing the parties' out-of-court statements. I'll note
4 that Local Criminal Rule 57.7(c) states that "in a widely
5 publicized or sensational criminal case the Court may issue a
6 special order governing such matters as extrajudicial
7 statements by parties, witnesses, and attorneys likely to
8 interfere with the rights of the accused to a fair trial by an
9 impartial jury."

10 There is no question that this case is widely publicized.
11 And so the question is whether I should issue such an order,
12 and if so, what its contours should be.

13 At the outset, the parties disagree about the appropriate
14 standard that I should apply in this case. The government
15 argues that the appropriate standard is the one set forth by
16 the Supreme Court in *Gentile v. State Bar of Nevada*, 501 U.S.
17 1030. In that case the Supreme Court held that it does not
18 violate the First Amendment to prohibit a criminal defense
19 counsel's speech if the lawyer knows or reasonably should know
20 that it will have a substantial likelihood of materially
21 prejudicing an adjudicative proceeding.

22 The Court explained that those restrictions served the
23 integrity and fairness of the judicial system and imposed only
24 narrow and necessary limitations aimed at two principal evils:
25 one, comments that are likely to influence the actual outcome

1 of the trial, and two, comments that are likely to prejudice
2 the jury venire.

3 By contrast, the defense argues that the *Gentile* standard
4 only applies to defense lawyers, and that any speech
5 restrictions on defendants themselves must satisfy a higher
6 standard. Specifically, the defense argues that any so-called
7 gag orders must survive strict scrutiny, and that the
8 government must prove that any prohibited speech would
9 constitute a clear and present danger to the administration of
10 justice.

11 Neither the Supreme Court nor the D.C. Circuit have
12 addressed the issue of the standard that applies to criminal
13 defendants in a case such as this. However, the Fifth Circuit
14 has expressly applied *Gentile's* substantial likelihood of
15 material harm test to criminal defendants as well as their
16 counsel. And that case is *United States v. Brown*, 218 F.3d
17 415 at 428.

18 I'm not aware of any circuits that have declined to do so
19 since *Gentile*, and, in addition, while courts in some other
20 districts have adopted a higher standard for restricting
21 defendant's speech than *Gentile's*, it appears that courts in
22 this district generally apply the substantial likelihood of
23 material harm test.

24 In any event, I don't think I need to make a ruling on the
25 question of which standard applies because I intend for any

1 order I issue to meet -- to satisfy either test.

2 So before considering whether additional restrictions are
3 warranted, I want to briefly review the restrictions that are
4 already in place as a result of this case. So to begin with,
5 Local Criminal Rule 57.7(b) limits the public statements of
6 attorneys in criminal cases.

7 For instance, attorneys may not issue extrajudicial
8 statements concerning the identity, testimony, or credibility
9 of prospective witnesses, or any opinion as to the accused's
10 guilt or innocence or as to the merits of the case or the
11 evidence in the case. And that's 57.7(b) (3).

12 The rule does not preclude attorneys, in the proper
13 discharge of official or professional obligations, from
14 describing the offenses charged, quoting from the case's
15 public record, or announcing without further comment that the
16 accused denies the charge.

17 As for Mr. Trump himself, his pretrial release conditions,
18 which he signed, require that he not communicate about the
19 facts of the case with any individual known to him to be a
20 witness, except through counsel or in the presence of counsel.
21 That's in ECF No. 13.

22 Mr. Trump's conditions of release also require him to abide
23 by all federal, state, and local laws. One such federal law
24 is U.S. Code Title 18, § 1512, which broadly prohibits efforts
25 to influence witness testimony, cause the withholding or

1 destruction of evidence, or hinder, delay, or prevent the
2 communication to a law enforcement officer or judge of the
3 United States of information relating to the commission or
4 possible commission of a federal offense or a violation of
5 conditions of release pending judicial proceedings.

6 Section 1512 bars not only physical force or the threat of
7 physical force, as in subsection (a)(2), but also, under
8 subsection (b), the knowing use of intimidation, threats,
9 corrupt persuasion, or misleading conduct, and under
10 subsection (d), the knowing harassment of another person.
11 These prohibitions apply to everyone -- defendants, the
12 government, their lawyers, and third parties.

13 In addition, the D.C. Circuit has held that Section 1512's
14 prohibitions apply to foreseeable as well as actual witnesses,
15 even when it is not certain whether they will testify. In
16 *United States v. Morrison*, the defendant challenged his
17 conviction under Section 1512 by arguing that at the time that
18 he contacted a witness the government had not yet announced
19 that the person was a potential witness, and the defendant
20 hadn't specifically asked the witness to testify for the
21 defense. That's 98 F.3d 619 at 630.

22 The D.C. Circuit squarely rejected that argument,
23 concluding that it was foreseeable by the defendant that the
24 government would use the witness because the witness had dealt
25 with the defendant during the events at issue and would

1 testify regarding the defendant's actions and behavior at the
2 time. So long as a witness is foreseeable, then, attempts to
3 unduly influence them may run afoul of Section 1512.

4 All that said, the government's motion does not seem to
5 allege that Mr. Trump has actually violated any of his
6 conditions of release or other federal law. Rather, the
7 government seems to contend that some of his statements
8 nonetheless warrant imposing additional speech restrictions
9 above and beyond any limits already in place.

10 Is that correct, Ms. Gaston?

11 MS. GASTON: Yes, Your Honor.

12 THE COURT: So with that backdrop in mind, I want to
13 ask some general questions about the government's proposed
14 order. You can come up.

15 MS. GASTON: Thank you, Your Honor.

16 THE COURT: So first I want to understand exactly what
17 your proposed order would prohibit that is not already
18 prohibited by the local criminal rules, federal law or
19 Mr. Trump's conditions of release. And I'm just trying to
20 nail down what the marginal change would be.

21 MS. GASTON: Yes, Your Honor. So I want to start by
22 making clear that the government's sole objective with this
23 motion is to ensure the fair administration of justice in this
24 case, by preventing extrajudicial statements that prejudice
25 the trial. We have no interest in stopping the defendant from

1 running for office or defending his reputation, nor does our
2 proposed order do that.

3 There are two specific sources of prejudice that the
4 government's motion seeks to prevent, and this goes to the
5 question that Your Honor just asked. The first is derogatory
6 and inflammatory or intimidating statements attacking
7 witnesses. These are statements that would not, for instance,
8 go to Section 1512, as Your Honor just identified, but these
9 are statements that risk influencing both the individual who
10 has been publicly attacked, and other witnesses who see the
11 public attack and are perhaps chilled in their own right.

12 And then the other source of prejudice is the trial of this
13 case out in the public rather than in this courtroom, because
14 when potential jurors are inundated by public and sometimes
15 false renditions of the expected evidence, or attacks on
16 witness credibility, or attacks on the motives of court
17 personnel or the prosecutors, it risks biasing the jury before
18 it is empaneled.

19 THE COURT: Okay. One part of the order that you have
20 requested would prohibit, as you said, disparaging and
21 inflammatory or intimidating statements about any party,
22 witness, attorney, court personnel, or potential juror. So
23 let's set aside for a minute the potential subjects of those
24 statements. How do you define disparaging and inflammatory or
25 intimidating? And again, how different is that from the kinds

1 of intimidating statements that are already illegal? I mean,
2 "disparaging" is pretty wide.

3 MS. GASTON: Yes, Your Honor. So the definitions that
4 we would propose for both of these are the commonly understood
5 definitions and the dictionary definitions. So "disparaging"
6 means vilifying, bringing reproach, discredit. "Inflammatory"
7 means inflaming anger or animosity. And we combined
8 "disparaging" and "inflammatory" in this proposed order
9 because it is the combination of those things that might
10 prejudice the jury pool.

11 So there could be fair ways to disparage somebody, to say a
12 factual thing that is true about them.

13 THE COURT: But you use the word "fair," and that
14 concerns me, because an order has to be narrowly tailored.
15 And when you use the word "fair," I am pretty sure that what
16 you consider fair is not what Mr. Lauro considers fair or his
17 client. And then you're asking the Court to get involved in
18 making these kinds of decisions for what appears to be a very
19 wide variety of statements. So what's your standard here?

20 MS. GASTON: Right. The standard, Your Honor, is that
21 this is about the participants, the witnesses in this trial.
22 It is limited to those individuals and it is limited to
23 statements that are meant to influence the venire or public
24 opinion.

25 And one thing I would like to point out, there was an

1 article in *The Washington Post* on Saturday that quoted the
2 defendant's spokesperson, and it quoted him saying that the
3 defendant's intent with his public statements regarding this
4 trial is to "try this case in the court of public opinion."
5 And that is exactly what the Supreme Court has said in cases
6 like *Sheppard* should not and cannot happen.

7 The Rule 57.7(c) order that we have proposed is narrowly
8 tailored to the two harms that I just mentioned, the attacks
9 on witnesses and the trial in the public sphere. And it does
10 do so in a narrowly tailored and least restrictive way
11 possible. And we are not wedded, Your Honor, to the exact
12 words in this order. We stand ready to work with the Court
13 and the defense to get the order right.

14 But what can't be is that because this is hard -- and we
15 know that it is hard, because it is hard whenever one is
16 balancing constitutional rights and thinking about these
17 difficult questions -- but the answer cannot be that the
18 defendant is permitted to intentionally try this case in the
19 court of public opinion and intentionally prejudice the
20 venire.

21 THE COURT: I'm going to get to you in a moment,
22 Mr. Lauro. I already asked my question as to whether the
23 order could be overinclusive. But I also have a question as
24 to whether it could be underinclusive. Because only
25 prohibiting disparaging statements doesn't really cover an

1 attempt to unduly influence a witness by publicly praising
2 them before a trial. Something like, you know, Mr. Jones is
3 great, I know Mr. Jones will do the right thing when the time
4 comes. Would that be covered under the order?

5 MS. GASTON: So that, Your Honor, is what we were
6 trying to get at with part 1(a), which is statements regarding
7 the testimony or credibility of expected witnesses, witness
8 bolstering in terms of trying to get out in the court of
9 public opinion that someone is particularly trustworthy so
10 that at trial, if a juror has heard that, they will regard the
11 witness in a different way from other witnesses.

12 THE COURT: All right. And finally -- well, not
13 finally because I'm going to have some more questions. But
14 the proposed order has a carve-out for Mr. Trump or his
15 lawyers to announce without further comment that the defendant
16 denies the charges. So, in effect, are you saying that the
17 defendant should be limited and his lawyers should be limited
18 to statements such as "I deny the charges" and "I have filed a
19 motion to dismiss"? Sort of, that's it? I mean, what would
20 be allowable?

21 MS. GASTON: It would be statements like that, but it
22 would also, Your Honor, allow the defendant to campaign. So
23 if he is asked generally by a nonparty to the case if he
24 committed the crimes he is accused of, he could say no, I
25 didn't and I acted appropriately in regard to those

1 activities.

2 THE COURT: Oh, you're envisioning a very different
3 scenario than what is currently in existence, Ms. Gaston.

4 All right. Mr. Lauro. I have some further questions, but
5 I want to hear Mr. Lauro.

6 MR. LAURO: I had to chuckle as well, Your Honor.
7 We're in the middle of a campaign.

8 THE COURT: I know, Mr. Lauro.

9 MR. LAURO: And we're dealing with prior restraint on
10 content-based political speech, which is the highest degree of
11 constitutional protection. The prosecutor couldn't answer
12 your questions because she ignores the fact that the Biden
13 administration is seeking to censor a political candidate in
14 the middle of a political campaign.

15 THE COURT: Mr. Lauro, let me stop you. Mr. Trump is a
16 criminal defendant. He is facing four felony charges. He is
17 under the supervision of the criminal justice system, and he
18 must comply with the conditions of release. He does not have
19 the right to say and do exactly as he pleases. Do you agree
20 with that?

21 MR. LAURO: Hundred percent. And in fact, Your Honor,
22 you have installed a regimen of rules and regulations that
23 everybody's abiding by. But like Mr. *Ford* --

24 THE COURT: Wait. Did you just say everybody's abiding
25 by?

1 MR. LAURO: Yes, Your Honor. And including -- and let
2 me just say this. We have two cases, only two cases that have
3 dealt with this issue: The *Ford* case, which dealt with
4 Congressman *Ford*. And that was clearly an instance where the
5 Court ruled that he should not be censored during his
6 political campaign.

7 In fact, during his entire position in Congress he was
8 able to say that the case was racially based and racially
9 motivated. He criticized the prosecution for that reason.
10 He criticized the prosecution for being politically motivated,
11 and that was permissible under the Sixth Amendment.

12 And the other case that you mentioned, *Brown*, what the
13 government doesn't tell you is that in that case the judge
14 specifically said there would be no order of censorship during
15 the political campaign. Here, these prosecutors want to prevent
16 President Trump from speaking out on the issues of the day. All
17 of the issues in this case are inextricably intertwined with
18 campaign issues: Presidential competency, the role of
19 prosecutors, the role of the DOJ, the role of political
20 interference, the issue of appointment of judges. Every single
21 issue that relates to this case also has political implications.

22 The prosecutors identify numerous social postings that they
23 say would violate some kind of order now --

24 THE COURT: I'm going to ask you about them, but I'm
25 going to interrupt you for a minute because I want to make

1 sure that I'm clear on this recurring theme that you raise
2 that -- throughout the motion and throughout this case and
3 here this morning, that the fact that Mr. Trump is running for
4 president and his corresponding need to speak freely somehow
5 entitles him to make statements that would otherwise be
6 unlawful? Is that what you're saying --

7 MR. LAURO: No, Your Honor.

8 THE COURT: -- that because he's running for
9 president --

10 MR. LAURO: Of course not.

11 THE COURT: -- he gets to --

12 MR. LAURO: No.

13 THE COURT: -- to make threats?

14 MR. LAURO: Absolutely not. And he hasn't made
15 threats. But what I'm saying is if the Court follows the *Ford*
16 case and the *Brown* case, the Court will apply strictest
17 scrutiny with respect to any kind of censorship order that's a
18 prior restraint on campaign speech. And that's what the law
19 requires.

20 THE COURT: This is -- it's not just a prior restraint
21 on -- your argument is a prior restraint on campaign speech.
22 But he has restraints on his speech. Do you disagree that
23 those restraints, the restraints that are in place, his
24 conditions of release, override his First Amendment rights in
25 his campaign? In other words, if he wants to talk about the

1 subject matter of a witness's testimony in his campaign, he
2 can't because he's subject to conditions of release that
3 prevent him from doing that.

4 MR. LAURO: I've said it twice, Your Honor. He's
5 subject to Your Honor's conditions of release, which he has
6 abided by. We don't disagree with that and we don't challenge
7 that. What we challenge is an effort by the Biden
8 administration to censor their leading opponent during a
9 political campaign. That is unheard of. The strictest
10 scrutiny should be applied by the Court.

11 Mr. Trump is allowed to say things like this is a
12 politically motivated prosecution. He's entitled to say
13 things that he's being treated unfairly. He's entitled to
14 speak truth to oppression. He's entitled to say that the
15 Department of Justice is acting unlawfully. He's entitled to
16 even say things that are insulting to these prosecutors, as
17 difficult as it may be for them to hear. But that is the
18 essence of free speech.

19 We have a marketplace -- a marketplace of free ideas in
20 our country, and free speech. The answer to oppression, the
21 answer to tyranny, is the ability of Americans to speak
22 freely. And here we have a situation where the Biden
23 administration, with all the powers --

24 THE COURT: Mr. Lauro, I understand you have a message
25 you want to get out.

1 MR. LAURO: No, it's not a message --

2 THE COURT: I want to address the motion and the law.
3 I do not need to hear any campaign rhetoric in my courtroom.

4 MR. LAURO: It is not campaign rhetoric, Your Honor.
5 What it is is the essence of how the courts have dealt with
6 these issues, both in the *Brown* case and in the *Ford* case.
7 And in both of those cases the courts have said we are not
8 going to censor political candidates. There is not one case
9 in the United States, not one case in which a court has
10 entered a censorship order against a political candidate who
11 is a party to litigation. Not once. This would be the first
12 time. And this is extraordinary, given the fact that we are
13 in the middle of a political campaign.

14 These prosecutors decided to bring this case in the middle
15 of a campaign. They chose to have this case inextricably
16 intertwined with a political campaign, following President
17 Biden's statement in November 2022 that he would do anything
18 he could to prevent President Trump from assuming office
19 again. That's in the public record.

20 President Trump is entitled to respond to that by saying
21 that these proceedings are unfair, it's an effort of political
22 interference, it's abhorrent to the basic structure of
23 American policy and the Constitution. He's entitled to say
24 that as a political candidate. And no court has ever
25 restricted a candidate from doing that. What he is required

1 to do is abide by Your Honor's orders and he's done that. And
2 one other --

3 THE COURT: Well, I'm going to take issue with that.
4 I'm going to let you finish your point, but then I'm going to
5 have some specific questions about some specific statements
6 he's made. But first I have some questions for Ms. Gaston.

7 MR. LAURO: Okay.

8 THE COURT: Finish your point.

9 MR. LAURO: One last thing, Your Honor. There is no
10 suggestion that the government has provided anything other
11 than speculation and conjecture that there's been any
12 influence on any jury pool with respect to these matters.
13 We're in the middle of a presidential campaign. The easiest
14 solution to all of this is an obvious one. And the Court in
15 *Landmark* and the courts have identified the easiest solution,
16 and that is to adjourn the case after the presidential
17 election. That's the solution.

18 If these prosecutors were really interested in justice,
19 that's what would happen. We would have a trial where
20 President Trump's right to effective assistance of counsel
21 would be guaranteed and provided for. We wouldn't have a rush
22 to judgment. We wouldn't have a trial immediately preceding
23 one of the most important days in the election cycle. That's
24 the way to deal with this issue.

25 THE COURT: This trial will not yield to the election

1 cycle and we're not revisiting the trial date, Mr. Lauro.

2 MR. LAURO: Your Honor, I'm not asking that. All I'm
3 saying is that President Trump, in the middle of a campaign,
4 that they chose to bring this case in, is entitled to exercise
5 his First Amendment rights. We are talking about a censorship
6 order of a candidate that is unheard of in our constitutional
7 history. It's never happened before. Ever.

8 THE COURT: There are a lot of things in this case that
9 have never happened before, Mr. Lauro.

10 MR. LAURO: I understand, Your Honor. Absolutely.

11 THE COURT: All right. Let me hear -- Ms. Gaston, let
12 me ask you -- and I'm going to come back to -- I have some
13 questions about some of these specific statements. But I want
14 to ask Ms. Gaston about basically how this would work.

15 So let's say I entered the order as the government proposed
16 it, and Mr. Trump or one of the attorneys in this case makes a
17 statement that the government believes violates the order's
18 restrictions. What are you proposing to happen next? Would
19 you be asking for revocation of supervised release? Financial
20 penalties? Home detention? Criminal contempt? Moving the
21 trial date up? How would that work?

22 You know, I've stressed that this case is going to proceed
23 as any other case, that this defendant is going to be treated
24 the same as any other defendant, but there are realities that
25 we have to face because the defendant is a former president.

1 There are accommodations I have made, for instance, allowing
2 the defendant to -- waiving his presence today, which I have
3 done occasionally but not often.

4 How does it work? What do you propose?

5 MS. GASTON: Yes, Your Honor. The first thing I would
6 say is all of the options that you just mentioned are
7 available to the Court. There are the options to -- the Court
8 could admonish the defendant, the Court could pursue financial
9 penalties. The Court could, like in the *Stone* case, determine
10 that if the defendant violates this order then it's
11 appropriate to modify his conditions of release.

12 THE COURT: What would be the procedural posture? I'm
13 sorry. Would it be an order to show cause? The Court should
14 sua sponte find a violation?

15 MS. GASTON: Either of those things is possible,
16 Your Honor. The Court could take action sua sponte or the
17 government could move. But what I would say is that is a
18 hypothetical that the defendant is going to violate the order,
19 and I would suggest in the first instance that we get in place
20 an order to see if --

21 THE COURT: An order is sort of pointless if you don't
22 have a mechanism to enforce it.

23 MS. GASTON: And as I said, Your Honor, there is an
24 array of options for enforcement.

25 THE COURT: Mr. Lauro, assuming I were to issue such an

1 order and there was an allegation of a violation, what would
2 be the proper procedural posture? Again, I know you disagree
3 that there should be an order, but assuming there was such an
4 order.

5 MR. LAURO: Here's the problem. It's asymmetrical. It
6 doesn't prevent Joe Biden from making statements --

7 THE COURT: Joe Biden is not a party to this court,
8 neither is he under --

9 MR. LAURO: I'm sorry, Your Honor?

10 THE COURT: He's not a party to this case; he's not
11 subject to conditions of release.

12 MR. LAURO: Well, I understand. We're not talking
13 about conditions of release. We're talking about a censorship
14 order, and gag orders traditionally have applied to both
15 sides. So what the prosecutors are not suggesting is that
16 President Biden would equally be subject to a censorship --

17 THE COURT: I want you to answer my question.

18 MR. LAURO: How to enforce an order in the middle of a
19 campaign is impossible under the circumstances that they've
20 alleged. It's actually impossible. How can Your Honor either
21 fathom or create an order that deals with all the issues that
22 might come up?

23 Let me give you an example. President Trump wants to
24 criticize Vice President Pence for his activities as vice
25 president. Is he allowed to do that? Is that disparaging?

1 Is that witness intimidation? He says something contrary --

2 THE COURT: I'm going to get to that, Mr. Lauro. I'm
3 going to get to the parameters and the contours of any
4 proposed order and what type of speech it affects and what
5 type of speech it doesn't.

6 What I'm asking you for at this point is were there an
7 order, what is the procedural posture that you believe would
8 govern enforcement of such an order.

9 MR. LAURO: Your Honor, that is impossible to say
10 because I can't conceive of an order that would be lawful.
11 Obviously, we would appeal it immediately. But the bottom
12 line is what we're talking about is a procedure where Your
13 Honor is entertaining an order of the Court which, if
14 violated, would have civil or criminal consequences.

15 However, under the circumstances that the prosecutor has
16 described -- and she's not answered a single question in
17 response to your questions in terms of how this would be
18 organized -- it's absolutely ridiculous to think of an order
19 that would prevent a candidate from speaking out on these
20 issues.

21 I don't know what Your Honor would do under the
22 circumstances, but I do know that there's no limits to the
23 kind of order that's being suggested. It's not narrowly
24 tailored, it's completely vague, it's overbreadth, it violates
25 every single aspect of the First Amendment. You can't come

1 up with a better hypothetical for violating the First
2 Amendment than what these prosecutors have suggested under
3 the circumstances.

4 So I can't solve your problem, Your Honor, because in my
5 view the issue is there should not be an order under any
6 circumstances. We have a free society where people can speak
7 freely. What President Trump cannot do is violate the
8 conditions of his release. He's not done that. No one has
9 done that. There's been no threats. There's been no
10 accusations against any kinds of witnesses. There's been
11 nothing that amounts to intimidation.

12 What you have put in place, respectfully, is working.
13 This --

14 THE COURT: I'm going to have to take issue with that,
15 Mr. Lauro.

16 MR. LAURO: Well, you know, it's politics, Your Honor,
17 and people say vituperative things or colorful things in
18 politics. And that's what's going on.

19 THE COURT: Politics stops at this courthouse door.

20 MR. LAURO: Absolutely. And there's no politics in
21 this courtroom. But there is politics out there. There's a
22 presidential election going on right now.

23 THE COURT: All right. Mr. Lauro --

24 MR. LAURO: And people are entitled to speak about --

25 THE COURT: -- I have some particular questions about

1 the specific type of statements that have been made at issue,
2 but I'm going to ask the government some things first.

3 MR. LAURO: But one other thing if I may, Your Honor.
4 The harm that's being suggested by the prosecution or the
5 Biden administration is completely speculative and conclusory.
6 They have not come forward with any identifiable witness who
7 says I feel intimidated by these political discussions. They
8 have not come forward with any data suggesting that the jury
9 pool is prejudiced in any way.

10 THE COURT: The government filed along with its motion
11 redacted information from people who are involved in this case
12 who attested to what happened to them after they participated
13 and spoke out. That's not sufficient?

14 MR. LAURO: Of course not, Your Honor. First of all,
15 that predated this case. Second of all, President Trump's
16 speech cannot be censored by Your Honor because of some third
17 party that does something outside of his control. That's
18 abhorrent to the First Amendment. Are we going to tell
19 Americans they can't speak because there's a possibility that
20 some crazed person might do something inappropriate? That
21 would end the First Amendment as we know it.

22 THE COURT: All right. Thank you, Mr. Lauro. At this
23 point I'd like to review and discuss some of the statements
24 that Mr. Trump has made since his indictment, including some
25 that he made after the government filed this particular motion

1 for an order.

2 In my view the statements fall into roughly five
3 categories. The first, statements about the District of
4 Columbia and its jury pool; the second, statements about the
5 Biden administration or the Justice Department; the third,
6 statements about Special Prosecutor Smith and his staff; the
7 fourth, statements about judges and their staff; and the fifth
8 is statements about political witnesses.

9 Now, I think our discussion would be most productive if I
10 walk through each of these categories. So the first is
11 statements about the District of Columbia and the jury pool.
12 So let's begin with Mr. Trump's statements about the District
13 of Columbia.

14 On August 6, 2023 he posted this statement on social media:
15 "No way can I get a fair trial, or even close to a fair trial
16 in Washington, D.C. There are many reasons for this but just
17 one is that I am calling for a federal takeover of this filthy
18 and crime-ridden embarrassment to our nation where murders
19 have just shattered the all-time record, other violent crimes
20 have never been worse, and tourists have fled. The federal
21 takeover is very unpopular with potential area jurors but
22 necessary for safety, greatness, and for all the world to
23 see."

24 I don't think there's much question that calling the
25 District of Columbia a filthy and crime-ridden embarrassment

1 to our nation disparages the District and the people who live
2 in it, including those who could eventually make up the jury
3 pool in this case. The government argues that such statements
4 must be prohibited lest they cause members of the D.C. jury
5 pool to become biased against Mr. Trump.

6 So, Ms. Gaston, let's assume that these statements have
7 affected some D.C. residents' impartiality. Why can't that
8 problem be addressed through narrow measures such as careful
9 voir dire or cautionary jury instructions?

10 MS. GASTON: Yes, Your Honor. The issue there is that
11 *Sheppard* stands for the principle that the Court has an
12 obligation to prevent prejudice to the venire if it's possible
13 to do so, rather than just trying to fix it on the back end.
14 And the government fully expects the Court to engage in
15 searching voir dire as we suggested in a more recent motion.

16 But that doesn't solve the -- that doesn't really fix the
17 problem. And it's not really fair for the defendant to issue
18 repeated public statements about the venire in the District of
19 Columbia and then later complain that jurors know about his
20 statements criticizing the venire in the District of Columbia,
21 which is no doubt what he plans to do, as he has stated
22 repeatedly that he intends to try to change venues.

23 THE COURT: All right. Mr. Lauro, just to clarify on
24 this limited question. Do you disagree or agree that
25 Mr. Trump's statements could be understood as disparaging the

1 District of Columbia?

2 MR. LAURO: Totally disagree, Your Honor. What he is
3 disparaging is the Biden administration that has allowed this
4 great city --

5 THE COURT: That's not what he said. That's not what
6 he said.

7 MR. LAURO: It's what --

8 THE COURT: No, he called the District a filthy and
9 crime-ridden embarrassment to our nation. I don't see
10 anything about the president in there.

11 MR. LAURO: He's deeply concerned about what's happened
12 to the District of Columbia -- I may be the only person in the
13 well of this courtroom that's served as an advisory --

14 THE COURT: I -- yes.

15 MR. LAURO: -- commissioner in the District of
16 Columbia --

17 THE COURT: Before it became a filthy and crime ridden
18 embarrassment?

19 MR. LAURO: Well, Your Honor, before the Biden
20 administration allowed crime to go to the extent that it has.
21 And that's a perfect example. And there's laughter in the
22 courtroom, and that's fine. But the reality is, Your Honor,
23 that President Trump is entitled to speak out about what's
24 happened to the District of Columbia in the last three years
25 since the Biden administration has been in office. And no one

1 can doubt that crime has gone up and the quality of life of
2 the people in the District of Columbia has been implicated, as
3 well as everybody who's a tourist coming to this great city.
4 Mr. Trump is allowed to speak out on those issues.

5 Now, his language may be language that the prosecution
6 doesn't like, but that's part of living with the First
7 Amendment. He's entitled to draw attention to the fact that
8 there are deep problems in this city that need to be addressed
9 that haven't been addressed by the Biden administration.
10 That's in no way a suggestion or some kind of defamatory
11 comment with respect to the people that live in this great
12 city.

13 And by the way, if you suggest, as the prosecution
14 suggests, that it's an attack on jurors, then they would be
15 likely to be biased against President Trump, not for him. So
16 the reality is that these comments on public policy highlight
17 why an order of censorship is impossible to enforce,
18 impossible to fathom.

19 But I don't look at those statements in any way as
20 disparaging as to the people of the District of Columbia. It
21 goes to the people who are running the District of Columbia.

22 THE COURT: Well, those statements can be a
23 double-edged sword when they are considered in light of a
24 motion to change venue.

25 MR. LAURO: But isn't that the problem with censorship?

1 Isn't that the problem? Because people --

2 THE COURT: Mr. Lauro, you keep saying censorship.

3 MR. LAURO: Right.

4 THE COURT: There is no question that a court is
5 entitled to draw restrictions on a defendant's behavior and a
6 defendant's speech pending trial. So you keep talking about
7 censorship like the defendant has unfettered First Amendment
8 rights. He doesn't. So -- I mean, you can keep using that
9 term for whatever reason you want to, but we're not talking
10 about censorship here; we're talking about restrictions to
11 ensure that there is a fair administration of justice in this
12 case.

13 MR. LAURO: Your Honor, a prior restraint on
14 content-based political speech is censorship. I think I'm
15 entitled to say that. Whether you want to call it a gag
16 order -- if that's a better description, that's fine.

17 But what does a gag order do? It censors speech. And the
18 bottom line here is that as Your Honor struggles with these
19 comments, I think it's very helpful for all of us to see how
20 difficult it would be. For example, if Your Honor entered an
21 order along the lines that the prosecution has suggested,
22 would that posting violate the order?

23 THE COURT: If I were to enter an order saying he
24 couldn't disparage the District of Columbia, it might.

25 MR. LAURO: It might. But that chills speech during a

1 political campaign. That's the problem.

2 THE COURT: What would --

3 MR. LAURO: That's the problem.

4 THE COURT: But wait -- no.

5 MR. LAURO: Okay. I'll wait for you.

6 THE COURT: An order such as the Government has
7 requested -- and I'm not by any means suggesting I would enter
8 an order having to do with the District --

9 MR. LAURO: Right.

10 THE COURT: -- of Columbia -- that would not stop
11 Mr. Trump from saying the Biden administration has neglected
12 the city, the Biden administration has resulted in all sorts
13 of problems for the District of Columbia. That is different
14 from saying the District of Columbia is a filthy crime-ridden
15 embarrassment to the nation. Those are two different types of
16 statements.

17 MR. LAURO: So now we're going to have a court
18 directing how a presidential candidate should talk about
19 issues relative to the campaign.

20 THE COURT: Under the order in this case, a defendant
21 would have to curb their speech so as to comply with an order.
22 And it is not a difficult or impossible task.

23 MR. LAURO: But as Your Honor said, it might violate.
24 That's the problem with violating the First Amendment. It
25 might violate it. So now we're going to have a situation

1 where a presidential candidate cannot say that Washington,
2 D.C., is crime ridden and infested with rats even though we
3 know factually that's the truth. So I consider that
4 censorship, Your Honor.

5 The truth is that anybody who lives in this city right now
6 understands what's happened in the last couple of years, and
7 if President Trump cannot speak to that issue, then he's not
8 able to talk about the leading questions in the campaign. And
9 that's what's so harmful about what the prosecution is trying
10 to do. They're trying to squelch political speech.

11 THE COURT: Okay. I'll get back to that. Did you want
12 to respond to that, Ms. Gaston?

13 MS. GASTON: Yes, Your Honor, there are multiple things
14 I'd like to respond to. So what Mr. Lauro is saying is that
15 the defendant is above the law and he is not subject to the
16 rules of this court like any other defendant is.

17 So I'd like to talk first about Mr. Lauro's statement that
18 the defendant can't campaign if such an order is in place.
19 That's just not true. All this order would do is prevent him
20 from using his campaign as an opportunity to broadcast
21 materially prejudicial statements about this case, statements
22 that risk improperly influencing witnesses and jurors.

23 The post that Your Honor just used is an example. That was
24 not a criticism of the District of Columbia in general or the
25 Biden administration's governance of the District of Columbia.

1 That was attacking the jury pool in this case. It explicitly
2 says it's about his trial in this district.

3 THE COURT: All right. I know you have some more
4 general comments, responses with regard to the political
5 speech issue, but there are five categories of statements, and
6 I want to get through them, and we just did one. So let me
7 ask you while you're up here about statements about the Biden
8 administration or the Justice Department.

9 As I've said before, Mr. Trump, as someone under criminal
10 indictment, does not have unfettered First Amendment rights
11 when exercise of that right conflicts with his conditions of
12 release, the protection of witnesses, and the administration
13 of justice. But I do have some concerns about the breadth of
14 the order that the government proposes.

15 Mr. Trump has repeatedly referred to the President of the
16 United States and the Department of Justice using such terms
17 as "Crooked Joe Biden" and the "Department of Injustice."
18 These kinds of statements would seem to fall within the
19 category of disparaging statements, as your motion lists them,
20 about one party, the government.

21 But again, wouldn't that be casting a rather broad net?
22 How would this kind of name calling affect the administration
23 of justice in this case? And I'm simply referring here again
24 to the second category, which is name calling of the president
25 and Department of Justice. I haven't gotten on to witnesses

1 and court staff and so on.

2 MS. GASTON: So let me talk about that category in two
3 parts, because the first part, criticizing President Biden, is
4 an example of how this order really doesn't restrict the
5 defendant.

6 THE COURT: I'm going to interrupt you. So would
7 saying "Crooked Joe Biden," does that violate the order?

8 MS. GASTON: So, Your Honor, the defendant talks about
9 "Crooked Joe Biden" all of the time. His Truth Social page is
10 replete with that and other criticisms of President Biden.
11 That's the majority of his posts. The vast majority of his
12 speech would be untouched.

13 THE COURT: So your answer to my question then is, no,
14 that would not violate the order? "Crooked Joe Biden"?

15 MS. GASTON: His criticisms of "Crooked Joe Biden" are
16 not.

17 THE COURT: What about the "Department of Injustice"?

18 MS. GASTON: Your Honor, that does present a concern
19 that a juror will think, oh, the Department of Justice is
20 crooked. But let me just -- I want to sort of confront one
21 thing head on that Mr. Lauro said, which is he suggested that
22 the government's criticisms of the post attacking special
23 counsel's office or prosecutors was because we didn't like
24 what the defendant was saying. That's not what that is about.
25 Our concerns about those posts or the posts about the special

1 counsel's office or the Court are not because we're trying to
2 defend ourselves or defend the Court. It's because of a
3 concern that a juror will come to jury selection and not be
4 able to follow the Court's instructions because of having read
5 these things.

6 THE COURT: But, why wouldn't we be able to elicit that
7 through voir dire?

8 MS. GASTON: We will certainly get at that through voir
9 dire, Your Honor, but *Sheppard* stands for the principle that
10 we can't just allow that to happen up until the point of voir
11 dire, allow the jury pool to be prejudiced and then try to
12 solve it on the back end.

13 THE COURT: But again, I am -- Mr. Lauro has a point
14 that this order is broad. What are disparaging statements?
15 So I'm trying to get a sense from you. So "Crooked Joe Biden"
16 would not be a violation, but the "Department of Injustice"
17 would?

18 MS. GASTON: He can criticize President Biden to his
19 heart's content, Your Honor, because President Biden has
20 nothing to do with this case.

21 THE COURT: All right. I take the basic message of
22 these statements -- and I'm still here on the subject of
23 statements about President Biden and the Department of
24 Justice. I take the basic message of the statements to be
25 that Mr. Trump believes that his prosecution is politically

1 motivated. But how do they materially prejudice this
2 proceeding? You just talked about a juror coming in here, but
3 again, I think that issue could be developed and those
4 feelings would be raised and fleshed out during voir dire.

5 It seems awfully close to his right to assert his innocence
6 and criticize the government. And the Supreme Court
7 emphasized in *Gentile* that speech critical of the exercise of
8 the state's power lies at the very center of the First
9 Amendment.

10 So again, the problem with your order as it is written at
11 the moment is it would seem to include statements like
12 "Crooked Joe Biden" because it's disparaging, and there's an
13 argument to be made that that's legitimate, I suppose,
14 criticism of a political opponent. What's the answer to that?

15 MS. GASTON: Your Honor, the answer to that is there is
16 a proper place for those claims in a criminal case, and that
17 is for the defendant to file the selective and vindictive
18 prosecution motion that he has stated that he is going to
19 file. The proper place in a criminal case for the claims
20 about the Court were in --

21 THE COURT: I'll get to those. But I mean, there's a
22 political campaign going on, as Mr. Lauro reminds us. How
23 does his criticism of the Biden administration and the
24 Department of Justice factor in to my assessment as to whether
25 he's violated the protective order if I simply issue an order

1 that says he's not allowed to make disparaging statements as
2 you've described them in the order? Won't "Crooked Joe Biden"
3 or the "Department of Injustice" cause a problem?

4 MS. GASTON: Yes. Your Honor, if we look at the order,
5 disparaging and inflammatory or intimidating statements about
6 any party, witness, attorney, court personnel, or potential
7 jurors. So we're talking about the participants in this case.
8 And so I can't say it again, the "Crooked Joe Biden" thing,
9 he's not a participant in this case. The defendant can say
10 that.

11 THE COURT: All right. So I'm going to move on to the
12 third category, statements about the special prosecutor and
13 his staff.

14 MR. LAURO: May I respond?

15 THE COURT: Yes, you can. You may. I do take your
16 point about the problems with the very wide category of
17 disparaging. But can you confine your response to the issue
18 of President Biden and the Department of Justice because I'm
19 moving on to statements about the special prosecutor.

20 MR. LAURO: Thank you, Your Honor. Thank you for the
21 time to respond.

22 What if President Trump were to say "Crooked Joe Biden, who
23 was bribed by millions of dollars, also approved of this
24 prosecution which I believe is politically motivated to
25 interfere in the election"? What if he said that? Does it

1 violate the prosecutor --

2 THE COURT: Well, address your question to me.

3 MR. LAURO: I'm sorry, Your Honor. The reality is,
4 does it violate the order as joined by the prosecution?

5 THE COURT: Ms. Gaston. And you all can speak into the
6 microphone at counsel table if you like or come on up.

7 MS. GASTON: Yes, Your Honor, because that is falsely
8 suggesting that President Biden directed this prosecution,
9 which he did not. And that could prejudice the venire.

10 THE COURT: Well, the problem, Ms. Gaston, is there is
11 a -- you know, there's an argument to be made the Department
12 of Justice is, you know, under the control of the Executive
13 Branch and -- I mean, it's going to be part of a campaign.
14 Is it your position that a statement by the defendant that this
15 campaign is politically motivated and brought about by his
16 political rival, that violates the gag order?

17 MS. GASTON: That -- I'm sorry?

18 THE COURT: A statement such as the one Mr. Lauro just
19 proposed or hypothesized, that the prosecution of the
20 defendant is directed by the president through his Justice
21 Department to silence a political rival or eliminate a
22 political rival, that would be barred by the order?

23 MS. GASTON: Your Honor, by the plain language of the
24 order, it would not because Joe Biden is not a party, witness,
25 attorney, court personnel or potential juror.

1 THE COURT: There's your answer, Mr. Lauro.

2 MR. LAURO: They said in their papers, and they said
3 that what President Trump said was false, that Biden did
4 not --

5 THE COURT: Get closer to the microphone.

6 MR. LAURO: And they used that as an example of
7 something that would violate the order. So they have to read
8 their own papers before they respond to the Court.

9 But the other issue is what if President Trump said "Hunter
10 Biden is allowed to sue witnesses in his case, and his lawyers
11 are allowed to talk publicly about Hunter Biden's case, but my
12 lawyers cannot, and I have an order against me where my speech
13 is being regulated"? What if he said that during a political
14 campaign?

15 THE COURT: You know, actually, Mr. Lauro, I have a
16 list of hypothetical statements I'm going to get to in a
17 moment, but not yet.

18 MR. LAURO: Okay.

19 THE COURT: As far as I know, Hunter Biden --

20 MR. LAURO: We're just trying --

21 THE COURT: -- is not before this court --

22 MR. LAURO: I know, Your Honor. But we're just trying
23 to struggle with the circumstances of what's being proposed
24 here. And I know you're trying to struggle with it as well,
25 and you're asking excellent questions. I'm sitting here

1 thinking George Orwell would have a field day with what we're
2 hearing from these prosecutors.

3 THE COURT: George Orwell would definitely have a field
4 day.

5 All right. The third category is statements about the
6 special prosecutor and his staff. And Mr. Trump has
7 repeatedly targeted individual members of the prosecution in
8 this case. In the examples cited in the government's motion,
9 the defendant repeatedly refers to Special Counsel Jack Smith
10 as "deranged" and his staff as "thugs," and he did so again
11 last night. These statements are more troubling.

12 I know that counsel for both the defense and the government
13 have spent significant time as prosecutors. And so I think
14 that we all understand that at some point a defendant's
15 targeted disparagement of government officials can go from
16 permissible criticism of those officials to encouraging harm
17 against them. "Will no one rid me of this meddlesome priest"
18 comes to mind.

19 If you call certain people "thugs" enough times, doesn't
20 that suggest, Mr. Lauro, that someone should get them off the
21 streets? How is calling a civil servant, doing their job, a
22 job which they've done through several administrations, a
23 thug, necessary to advance a political debate or campaign?

24 And I'm trying to understand the First Amendment values
25 here, because if the message Mr. Trump wants to express is my

1 prosecution is politically motivated, what additional purpose
2 does it serve to use derogatory labels about the prosecutors?
3 Again, public servants who are doing their job as they have
4 been doing for many years. And not just derogatory labels but
5 highly charged language. What does that advance?

6 MR. LAURO: Yeah. So Harold *Ford*, who was a
7 congressman from Tennessee, African American congressman,
8 accused his prosecutors of being racist. And the Sixth
9 Circuit court of appeals said he's entitled to do that in
10 connection with his political activities. Now, the words used
11 here are "deranged," which I looked up in Merriam dictionary.
12 That means insane or out of your mind. "Thug" is another word
13 for bully.

14 I think it's fair for President Trump to say, number one,
15 this prosecution is insane and deranged, and number two, that
16 he is being bullied in the process, throughout these
17 proceedings, where the government has denied him due process
18 and effective assistance of counsel. He's entitled to make
19 those statements.

20 But most importantly, even a criminal defendant, believe it
21 or not, still has First Amendment rights to criticize the
22 prosecutor that's bringing the case. And in this case we have
23 Jack Smith, who made outrageous, outrageous statements the day
24 of the indictment trying to link President Trump to violence,
25 which Prosecutor Smith knew was incorrect and false. He did

1 everything he could to tamper with this jury pool. President
2 Trump is entitled to respond by saying that's deranged.

3 THE COURT: Well, Mr. Lauro, I'm not getting into your
4 opinion as to whether Mr. Smith's statements were true or
5 false. What I want to know is -- and you were a career
6 prosecutor. Okay? You were a career prosecutor --

7 MR. LAURO: I've been called worse.

8 THE COURT: -- and I want to know in what kind of case
9 do you think it would be appropriate for a criminal defendant
10 to call the prosecutor a thug and stay on the streets?

11 MR. LAURO: Your Honor, first of all, whether or not
12 that is language that I would use is irrelevant.

13 THE COURT: I'm not asking whether you would use it.
14 I'm asking if in a normal criminal prosecution a defendant
15 would be allowed to call the prosecutor a thug?

16 MR. LAURO: Your Honor, this is not a normal
17 prosecution. Look at it a moment -- and I know you were a
18 defense lawyer. Look at it a moment from what President Trump
19 sees. Okay? He has Joe Biden in November 2022 saying I'm
20 going to take out President Trump, okay? He says that. He
21 makes a public statement. Then we have a special prosecutor
22 appointed, not just any prosecutor but a prosecutor that went
23 after Bob McDonnell, a leading Republican candidate, and was
24 ultimately convicted, only to have his case reversed nine
25 nothing by the Supreme Court.

1 Then we have a prosecution here which is unprecedented,
2 which has never been brought in the history of the
3 United States, using statutes in all kinds of crazy ways to
4 take President Trump out of an election cycle. What is a
5 candidate supposed to do under those circumstances? Is he
6 supposed to just sit quietly?

7 And what the government is proposing here is an order not
8 just directed against President Trump but against the American
9 electorate that wants to hear from President Trump under these
10 circumstances. What's happening in this courtroom right now
11 will affect this country for years to come. Whether -- and
12 President Trump is entitled to respond to it. This is the
13 first time we've had a sitting administration prosecute a
14 political opponent. These are grave --

15 THE COURT: Mr. Lauro, no. I'm going to interrupt you.

16 MR. LAURO: Okay.

17 THE COURT: You have said that. You have said it
18 repeatedly. I have heard it. Obviously, you have an audience
19 other than me in mind.

20 MR. LAURO: I don't, Your Honor.

21 THE COURT: I have heard you say now multiple times
22 that this is an unprecedented prosecution. What I want you to
23 do is to answer my question as to why a criminal defendant
24 should be allowed to call a prosecutor a thug. There are many
25 words you can use to criticize a prosecution or a prosecutor.

1 But when you start using language like "thug" to describe
2 someone doing their job, that wouldn't be allowed by any other
3 defendant. And just because this defendant happens to be
4 running a political campaign does not give him the right to
5 use any kind of language that he wants.

6 So tell me how the word "thug" is justified here.
7 Politically based prosecution. I mean, why this kind of
8 language that frankly risks a real possibility of violence?

9 MR. LAURO: It certainly doesn't suggest that and
10 there's no imminent threat. But what does someone do in the
11 face of oppression? What kind of language do you use in a
12 system that now is bordering on totalitarianism and
13 authoritative actions that are being taken? What does a
14 citizen say? What does a citizen say in countries that are
15 veering towards tyranny? What do you say?

16 What do we say in the history of the United States when
17 there have been issues of government oppression and brave
18 citizens have risen and said very, very vituperative speech in
19 response to powerful people that have oppressed rights? What
20 is a citizen supposed to say when he's denied due process? I
21 don't know, Your Honor. I have never been confronted with
22 that, thank God.

23 But in President Trump's mind, that's what he's facing
24 right now. He is facing every single right being taken away
25 from him: the right to due process, the right to free speech,

1 the right to effective assistance of counsel.

2 THE COURT: Mr. Trump tweeted, posted -- whatever you
3 call it -- last night that he would be -- he's in Iowa
4 campaigning today while we are sitting here debating as to
5 whether he has violated his conditions of release and whether
6 there should be limits placed on his speech. So, please,
7 Mr. Lauro, let's tone this down a bit. Okay?

8 MR. LAURO: Your Honor, it's toned down, but as an
9 advocate -- and my voice is toned down. I know that Your
10 Honor has suggested before that it was not toned down. My
11 voice is very toned down. But I'm entitled to make arguments
12 on behalf of my client. But if Your Honor wants to censor my
13 speech too --

14 THE COURT: You're entitled to make arguments, but I
15 would ask that you answer my questions.

16 MR. LAURO: And, Your Honor, the question is, under the
17 circumstances what is someone supposed to do when faced with
18 those circumstances? And that was the word that President
19 Trump chose. Now, it may not be the word that you like, or it
20 may not be the word that the prosecution likes, but he's
21 entitled under the First Amendment to make those statements,
22 particularly in connection with the circumstances of this
23 case.

24 THE COURT: So what about statements disparaging the
25 prosecutors' families? I don't think the government cited

1 this in their motion, but I believe Mr. Trump has publicly
2 targeted Special Counsel Smith's family in general and his
3 spouse in particular. In what world is it permissible,
4 Mr. Lauro? In what world, in what case would it be allowable
5 for a criminal defendant to attack a prosecutor's family?

6 MR. LAURO: Your Honor, I don't think there was an
7 attack on a family member. What it was was an indication that
8 there might be political bias in light of Mr. Smith, and
9 certainly a First Amendment exercise of speech would allow a
10 criminal defendant to observe that a prosecution is
11 politically biased --

12 THE COURT: By mentioning their spouse, who has nothing
13 to do with this case?

14 MR. LAURO: Well, it deals with political issues
15 relating to Mr. Smith. And by the way, Your Honor, in terms
16 of whether or not those types of statements would violate an
17 order of the Court, there's no order in place that limits
18 President Trump from indicating that this is a politically
19 biased prosecution by a politically biased prosecutor. He's
20 entitled to do that. I know we're all uncomfortable about
21 that, but he's entitled to do that.

22 THE COURT: I'm not uncomfortable. I want to know why,
23 in criticizing the prosecution against him, he would feel it
24 necessary and you feel it appropriate for him to talk about a
25 prosecutor's spouse or family.

1 MR. LAURO: You're asking two different questions.
2 You're asking whether I personally --

3 THE COURT: No, no. I'm asking whether you as his
4 lawyer standing here are going to tell me that that speech is
5 appropriate and should be allowed despite the fact that your
6 client is under conditions of release.

7 MR. LAURO: Your Honor, what I'm saying is that it
8 meets the boundaries of the First Amendment. I'm not saying
9 whether or not it's appropriate from a lawyer's standpoint,
10 okay? My views as an attorney may be widely different than my
11 client's views as a candidate. But he is certainly entitled
12 to describe why he believes this prosecution is politically
13 motivated.

14 THE COURT: And he's allowed to do that in unfettered
15 terms, even if it means mentioning a prosecutor's family.

16 MR. LAURO: I think it comes part and parcel of the
17 First Amendment. I mean, certainly in my situation, people
18 have attacked me. I'm not able to take any kind of action.
19 That's part of the reality of being involved in a case of this
20 nature. And it's clearly within the First Amendment. It's
21 not something that as an officer of the court that I would
22 engage in, and Your Honor knows I haven't engaged in anything
23 like that.

24 But President Trump firmly believes, firmly believes that
25 these proceedings are politically motivated by a politically

1 motivated prosecutor, and he has pointed out examples of how
2 this prosecutor is politically motivated.

3 THE COURT: Ms. Gaston?

4 MS. GASTON: Thank you, Your Honor. I think you
5 identified the reason why the government paired "disparaging"
6 with "inflammatory" in the proposed order. Because what the
7 defendant is doing here is not just disparaging; it is
8 inflammatory. He knows and understands the effect of these
9 statements, and it is that they are amplified, it is that they
10 motivate people to threaten others, and it not only prejudices
11 the jury pool, but in the case of witnesses -- and I know
12 that's Your Honor's final category so I will save most of this
13 for that -- but in the case of witnesses, it threatens and
14 chills witnesses too.

15 And one thing I would like to say is that the defendant has
16 demonstrated that he has the ability to regulate his speech.
17 There is no reason to use false and inflam- -- to use
18 disparaging and inflammatory rhetoric to make these points in
19 such a prejudicial way.

20 So in the September 17th *Meet the Press* interview in which
21 the defendant said false things about the potential testimony
22 of one of the witnesses in this case, he also demonstrated his
23 ability to decline to answer questions when it suits him. He
24 was asked repeatedly by the interviewer about his conduct on
25 the day of January 6, 2021, and he said, "Why would I tell you

1 that? I'm not going to tell you anything."

2 He is able to not say these things. But he is using his
3 campaign as a platform to make these statements with the
4 intention of trying the case in the court of public opinion
5 rather than in this courtroom.

6 THE COURT: All right. I want to turn to the fourth
7 category, which is the statements about the Court and its
8 staff. The government's motion reports that at various times
9 Mr. Trump has issued or reposted statements labeling me as "a
10 fraud dressed up as a judge," "a radical Obama hack" or "a
11 biased Trump-hating judge." And I noted that he did so again
12 last night.

13 Now, I am not the first judge to whom Mr. Trump has applied
14 such labels. And candidly, I am less concerned about
15 shielding myself from those kinds of statements. But as I've
16 already noted, Mr. Trump's free speech rights do not extend to
17 speech that knowingly invites threats or harassment,
18 especially when it could compromise the integrity of judicial
19 proceedings or result in the harassment or threats to people
20 who are simply doing their jobs.

21 So I was deeply disturbed to learn that just last week,
22 while the motion for a gag order in this case was pending,
23 Mr. Trump publicly targeted a staff member of a judge
24 presiding in another case. During the trial in that case, he
25 made a social media post that identified the staff member by

1 name and included a photograph of her with Senator Schumer,
2 which apparently led Mr. Trump to call her "Schumer's
3 girlfriend" and claimed "she was running this case against
4 me."

5 The judge in that case immediately ordered the removal of
6 the post and prohibited any further public statements about
7 members of his staff.

8 Now, Mr. Lauro, I know you're not counsel in that case, but
9 do you think that a defendant posting a photograph of a
10 judge's law clerk on social media is acceptable?

11 MR. LAURO: Your Honor, that is something that I
12 believe the Court in New York dealt with.

13 THE COURT: I'm not asking about what happened in
14 New York. I'm asking do you think it would be appropriate --
15 all right. Let me give you a hypothetical. Would it be
16 appropriate for Mr. Trump to post a photograph of a member of
17 my staff online while this case is pending?

18 MR. LAURO: If President Trump asks for my advice with
19 respect to that issue, I would advise him strongly not to do
20 that, for a number of reasons. So in answer to your
21 question --

22 THE COURT: That really wasn't my question.

23 MR. LAURO: Well, you know what my answer is.

24 THE COURT: My question is would it be appropriate to
25 do that?

1 MR. LAURO: I'm advising the Court that what I would
2 tell my client to do is not to do something like that.

3 THE COURT: And why?

4 MR. LAURO: Because, obviously, I believe that that's
5 not something that should be done in the course of a
6 campaign -- in the course of a court proceeding. And that was
7 directed and that was ultimately addressed by the court in
8 New York.

9 THE COURT: But that's what we're dealing with --

10 MR. LAURO: But that has nothing to do with --

11 THE COURT: Yes, Mr. Lauro, it does have something to
12 do with this case --

13 MR. LAURO: Well, it's nothing --

14 THE COURT: -- because that's the kind of behavior
15 we're dealing with here.

16 MR. LAURO: But nothing has happened like that in this
17 case and nothing like that will happen. What President Trump
18 has addressed is the issue of potential judicial bias, which
19 we raised very professionally and very appropriately with Your
20 Honor, and very respectfully, which is something we had to do
21 as a matter of our oath of office to adhere -- and represent a
22 client zealously. And it was addressed by the Court.

23 But in terms of judicial bias, once again, that's something
24 that the Supreme Court dealt with in the *Landmark* case, which
25 said, you know, yes, judges are subject to criticism, and

1 that's something that is well within the core of the First
2 Amendment.

3 THE COURT: So I guess even though this incident
4 occurred in another case, I want the parties' position on why
5 I shouldn't issue a similar order as Judge Engoron did in that
6 case, given the defendant's apparent willingness to post
7 personally identifying information, as well as disparaging and
8 obviously untrue remarks about court personnel, even after he
9 was on notice that the government was seeking a gag order in
10 this case.

11 Such behavior puts court staff, who are, again, just doing
12 their jobs, at tremendous risk of harassment, and it is
13 totally unnecessary for Mr. Trump in order for Mr. Trump to
14 publicly proclaim his innocence or to campaign for the
15 Republican nomination. So in light of the fact that, as you
16 said, you would advise your client not to do it, why shouldn't
17 I have an order that says he can't do it? Because he did it.

18 MR. LAURO: There's no need to. Because if Your Honor
19 makes that kind of admonition, it will be followed, and it has
20 been followed. Every time that Your Honor has directed us in
21 terms of what you find acceptable, we have conveyed that to
22 the client.

23 So if Your Honor tells me, as an officer of the court, this
24 is what I believe -- and I will, under absolute circumstances,
25 as you have directed, I will instruct my client along with

1 what you have just suggested.

2 And I think the court dealt with that issue in New York.
3 There's no reason for the Court to have to deal with it here.
4 It's not an issue in Washington, D.C. But the Court's
5 instructions and admonition is heard by all, and I will
6 certainly convey that to my client and he will understand that
7 the expectation is that he abide by Your Honor's instructions
8 in that regard.

9 Everything that's happened in this case, Your Honor, you've
10 had full control over this court, and you've been able to
11 issue orders that have been obeyed and have been followed, and
12 no one is suggesting that there's been a violation of any
13 order. The prosecution refers to the *Sheppard* case, which was
14 a situation where there was press in the well of the
15 courtroom. Nothing like that is going on here. Your Honor is
16 in control of the process.

17 THE COURT: All right.

18 MR. LAURO: But I will say, Your Honor, that some of
19 the things written about you have been very complimentary.

20 THE COURT: Don't believe everything you read.

21 (Laughter.)

22 THE COURT: Ms. Gaston.

23 MS. GASTON: Your Honor, Mr. Lauro suggests nothing
24 like what happened in New York has happened here. That is not
25 true. The defendant has repeatedly attacked this court in

1 disparaging and inflammatory ways, and this court has been the
2 subject of a criminal threat in relation to this case.

3 We are happy to have the Court enter an order preventing
4 the defendant from disparaging and inflaming comments
5 regarding court staff. But we think that should also be part
6 of an order expanding it further to protect other parties and
7 witnesses.

8 And I'm not sure what Mr. Lauro is getting at in saying he
9 will convey the Court's expectations to his client. That is
10 why we need an order expressing clearly on the record what the
11 Court's order is, not expectations.

12 THE COURT: All right. I want to talk about the final
13 category of statements, which is statements about prospective
14 witnesses in the case. The government's briefing identifies
15 several instances of such statements. I'll go over a few.

16 For example, on August 5th of this year, Mr. Trump stated
17 that former Vice President Pence had gone to the dark side, in
18 quotes, and publicly lied about conversations the two of them
19 had shared related to this case.

20 On September 5 of this year Mr. Trump repeated the
21 assertion that Mr. Pence had gone to the dark side and had
22 "made up stories about me which are absolutely false."

23 Mr. Trump also posted on social media a video attacking
24 former Attorney General William Barr and separately claimed in
25 an interview that Mr. Barr didn't do his job with respect to

1 the allegedly rigged election because he was afraid of being
2 impeached.

3 On September 22, Mr. Trump posted a statement celebrating
4 the retirement of the chairman of the Joint Chiefs of Staff
5 General Mark Milley. He stated, "This guy turned out to be
6 a woke train wreck who if the fake news reporting is correct
7 was actually dealing with China to give them a heads-up on the
8 thinking of the President of the United States. This is an
9 act so egregious that in times gone by the punishment would
10 have been death."

11 And Mr. Trump has said about Georgia's former Secretary of
12 State Brad Raffensperger: "I appreciate that he said that. I
13 didn't do anything wrong" during a phone call that was central
14 to the indictment in this case.

15 The defense argues that these potential witnesses are
16 public figures who have willingly entered into a hearty public
17 debate with Mr. Trump and so are unlikely to be intimidated
18 when Mr. Trump pushes back. And that in any event, Mr. Trump
19 has a right to engage with them politically. The defense also
20 claims that none of the statements directly threaten or call
21 for harm to those potential witnesses, and Mr. Trump's speech
22 shouldn't be limited based on speculation about what third
23 parties might do based on the statements.

24 And the defense counsel further contends that limits on
25 disparaging speech about prospective witnesses as the

1 government proposes is unworkable because the full set of
2 potential witnesses isn't yet known.

3 So I'm going to discuss each of these arguments in turn.
4 Let's start with the point about the witnesses who are
5 identified in the government's motion as being public figures.

6 Mr. Lauro, I take your point that it would be impossible
7 for Mr. Trump to not criticize Mike Pence, for example, since
8 both men are actively campaigning for the Republican
9 nomination. But it doesn't appear that any of the other
10 potential witnesses in this case fit that description, and I
11 know the government hasn't listed the witnesses or their
12 identities, but I'll get to that issue.

13 So why shouldn't I at least prohibit Mr. Trump from making
14 public remarks about other witnesses who aren't running for
15 president?

16 MR. LAURO: The government had every opportunity to get
17 affidavits from Mr. Barr, General Milley, or
18 Mr. Raffensperger --

19 THE COURT: Why should they have to?

20 MR. LAURO: Well, if they're claiming there is some
21 kind of intimidation, then they should have something more
22 than speculation and conjecture. For example, all three have
23 been very, very, very prominent in criticizing President
24 Trump, very strongly worded comments. Two of them have
25 written books about their experiences. So they've monetized

1 their interaction with President Trump. None of them have
2 ever suggested that the criticism of President Trump has led
3 to any diminution in their ability to do their job or testify
4 or do whatever they want to do in terms of criticizing
5 President Trump. Just the opposite. They give as good as
6 they take.

7 THE COURT: Really? And so you're suggesting that
8 Mr. Barr or Mr. Milley have suggested that Mr. Trump should be
9 executed? Is that what you're suggesting?

10 MR. LAURO: Well, Your Honor, first of all, the post
11 with respect to General Milley was not that he should be
12 executed. It related to what was written about in a Bob
13 Woodward book where General Milley described a conversation
14 with the Chinese authorities, the Chinese military, where he
15 said that he would give advance notice if the United States
16 took any action. Let me just finish, Your Honor. If I can,
17 you asked me the question, if I can answer.

18 THE COURT: But you're not answering it.

19 MR. LAURO: I am answering it. I am answering it.
20 So what President Trump responded -- and by the way, the
21 description in that book was General Milley, who apparently
22 leaked that information, went around the chain of civilian
23 command, did not tell the president, did not tell the
24 Secretary of Defense, and had a private conversation with our
25 enemy with respect to what the military was going to do.

1 In the middle of a campaign, President Trump, under his First
2 Amendment right, is entitled to say that that's inappropriate.
3 I would never have a joint chief of staff head that's engaging
4 in that kind of conduct.

5 THE COURT: Sure he is. Sure he is. What he's not
6 entitled to say is that kind of punishment would be -- in days
7 gone by, that kind of activity would in days gone by be
8 punishable by death.

9 MR. LAURO: It's true.

10 THE COURT: That is an absolute suggestion that that
11 is an appropriate thing to happen.

12 MR. LAURO: Your Honor, absolutely not. Again, that's
13 taking words I think a bridge too far. What he did say is
14 that the seriousness, the seriousness of that kind of
15 misconduct by a joint chief of staff is intolerable in a
16 democratic society where you have the military going around
17 the civilian chain of command -- can you imagine that? The
18 military ignoring the civilian chain of command and conversing
19 directly with our enemy? And President Trump in the middle of
20 a campaign is entitled to put the spotlight on it. The
21 American people are entitled to understand that and understand
22 the consequences of that. Can you imagine in days going
23 forward --

24 THE COURT: Mr. Lauro, why is he entitled to do that --
25 why is he entitled to suggest that an appropriate punishment

1 would be death?

2 MR. LAURO: Because we have a First --

3 THE COURT: No. As part of that. But again, the First
4 Amendment protections must yield to the administration of
5 justice and the protection of witnesses. And to write in all
6 caps "death" about someone who's a potential witness in this
7 case, doesn't that go too far?

8 MR. LAURO: Your Honor, first of all, it's true,
9 factually true that in years gone by -- in fact, I think it
10 still may be the penalty. It could be, where -- the death
11 penalty for treason. But the bottom line is, what if somebody
12 who commits a murder and is subject to the death penalty and a
13 political candidate says, you know what, what you did, you're
14 subject to the death penalty? That's factually true. It's
15 not inciting that somebody's going to take action like that.

16 THE COURT: That's right up to "Would no one rid me of
17 this meddlesome priest." If you suggest that someone is
18 deserving of execution, then it's not a far stretch to imagine
19 a situation where one of the millions of followers of this
20 person decides to go ahead and do that.

21 MR. LAURO: Well, you've hit the nail on the head
22 again. And the reality of the First Amendment, as I read the
23 First Amendment, and most people do, is you can't be penalized
24 for First Amendment speech because of something someone else
25 can do in a deranged speech.

1 I mean, after all, we had Democratic politicians
2 criticizing a Republican administration, and someone went out
3 and took a gun and shot Representative Scalise. Are we going
4 to say that Democrats can't criticize Republicans because it's
5 going to create the risk that somebody might do something
6 crazy?

7 And by the way, what President Trump was doing was
8 describing what existed in days gone past and indicating how
9 serious a breach that this was by General Milley. Apparently
10 he admitted to it to Bob Woodward.

11 So again, Your Honor, again, we're in the zone of clear
12 First Amendment speech, political speech, that we have to
13 tolerate in a free society. Even though there's criminal
14 prosecutions going on, under the circumstances that's core
15 First Amendment speech. First of all, there's nothing
16 untruthful about it. Second of all, under the *Brandenburg*
17 standard, it doesn't incite any type of action against any
18 individuals.

19 THE COURT: All right. Thank you.

20 Ms. Gaston.

21 MS. GASTON: Thank you, Your Honor. We both know that
22 the tweet or the post about General Milley was a threat. It
23 was a threat to him, and it was a threat to all witnesses in
24 this case that if you come after the defendant, he will come
25 after you. And Mr. Lauro is talking about all of these

1 nuances about chain of command when in truth, other witnesses
2 have come forward and said that General Milley was following
3 the chain of command and had permission for these
4 conversations.

5 THE COURT: The problem is that's neither here nor
6 there. There may be a legitimate conversation to have, a
7 debate, or statements to be made about what General Milley did
8 or didn't do. That's really none of my concern. What is my
9 concern is when potential witnesses are targeted. And my
10 concern is using the word "death" in all caps in a post about
11 a disagreement or a criticism of a potential witness in this
12 case could incite violence. But I want --

13 What is your response to Mr. Lauro's criticism that you
14 didn't provide any affidavits from either Mr. Barr or General
15 Milley?

16 MS. GASTON: Your Honor, the *Sheppard* and *Gentile* cases
17 stand for the proposition that this -- of course this
18 prejudice is speculative. We're not going to know if these
19 witnesses are intimidated or if this threatening activity is
20 intimidating other witnesses until folks testify at trial, and
21 we may not even know then because they may be chilled in ways
22 that we do not know. But it is the Court's duty to prevent
23 this prejudice from occurring, not to wait and see if it has
24 happened.

25 I'd also just like to address a couple things. So the post

1 about Mr. Raffensperger, who is a witness in this case,
2 misstated what Mr. Raffensperger said. And it was about the
3 exact topic that Mr. Raffensperger would be expected to
4 testify --

5 THE COURT: And that troubles me for a couple reasons.
6 It falls in the category of praising a witness with the
7 possible effect that the witness is given a message about what
8 their expected behavior should be. But it also, because it
9 concerns the subject matter of a witness's testimony, it makes
10 statements about the witness's expected testimony that the
11 government cannot respond to. And that subject matter is --
12 that testimony should happen in this courtroom, not out in the
13 public sphere.

14 So that's concerning. But I also have a question with
15 regard to Mr. Trump's statements about Mr. Pence and Mr. Barr
16 in particular. I'm not only concerned that he's talking about
17 them generally. And I guess the statement about
18 Mr. Raffensperger is included. I'm more concerned that he's
19 specifically disparaging what from the indictment appears
20 likely to be the subject matter of the expected testimony.

21 Mr. Trump is not campaigning against Mr. Barr, who by the
22 way previously served in his administration, nor is he
23 campaigning against Mr. Raffensperger or General Milley. So
24 why should he be making public remarks about them at all as
25 far as it goes to his campaign? They're not running against

1 him.

2 Mr. Trump is facing felony charges and he does not get to
3 respond to every criticism of him if that response could
4 affect a potential witness. And that's the bottom line here.

5 His statements also have the very real potential to
6 misstate the facts in this case that are to be determined by a
7 jury, and the government cannot respond. They can't respond
8 to what he posted about Mr. Raffensperger. What am I going to
9 do with that, Mr. Lauro?

10 MR. LAURO: Well, first of all, Your Honor, with
11 respect to General Barr, I think the president is entitled to
12 describe what he would like in an attorney general, and in
13 particular compare how Attorney General Barr conducted himself
14 with what kind of attorney general he would like.

15 THE COURT: You know, Mr. Lauro, it appears that what
16 we're talking about here is really a question of language and
17 semantics, because no one -- I have not said, and I don't
18 think the government has said, that Mr. Trump cannot respond
19 to criticism or that Mr. Trump cannot campaign. What the
20 issue is here is the language that Mr. Trump is using. And
21 that's -- you know, he doesn't get to use all the words.

22 MR. LAURO: Yeah.

23 THE COURT: He is constrained. And he is constrained
24 by not being able to use words that could be communicated as
25 threats or efforts to affect testimony.

1 MR. LAURO: That's the problem with censorship, is that
2 the government doesn't like the language that the person is
3 using. So none of these are threats, obviously --

4 THE COURT: Well, no. No. I disagree. I don't think
5 it's obvious.

6 MR. LAURO: I don't think anybody feels threatened;
7 otherwise they would have come before Your Honor. President
8 Trump certainly has a history of using forceful language and
9 creative language to draw attention to the problems of this
10 country. That's what he's done since 2016. He has every
11 right to criticize Mr. Barr. In fairness to Mr. Barr, he was
12 limited by prosecutors in the Department of Justice who
13 obstructed investigations into election fraud.

14 But the bottom line is that President Trump is entitled to
15 say things that are critical of Mr. Barr and Mr. Raffensperger.
16 These are people in the political sphere. These are public
17 officials. We're entitled to criticize people who exercise
18 power as a public official. There's nothing bad about that.
19 If anything, Your Honor, we need more speech, not less speech.

20 The reality is that the overwhelming amount of speech in
21 this case in this district has been anti-President Trump. You
22 had J6 hearings, you had television, you had all kinds of
23 things. In terms of the jury pool, if anything, this jury
24 pool is completely biased against President Trump. To
25 suggest --

1 THE COURT: And so repeatedly calling the District a
2 filthy crime-ridden embarrassment is going to aid in that
3 effort to make sure the venire isn't further tainted?

4 MR. LAURO: Well, as I said, it's indicative of what's
5 happened under the Biden administration, and certainly
6 President Trump is going to change that in 2024 and take the
7 rats off the street. But the bottom line is that what's
8 happened here, and this entire discussion, when you talk about
9 semantics and language, that's the problem that we have with a
10 censorship order.

11 You know what's going to happen, Your Honor? We are going
12 to be litigating ad infinitum all of these issues instead of
13 dealing with the case. We should be preparing for jury trial
14 right now instead of having these angels on a pin discussions
15 about what might violate a Biden administration censorship
16 order. We should be dealing with the issues in the case, not
17 about hypotheticals about what could and could not do to
18 violate an order during a political campaign.

19 And again, Your Honor, one simple solution. One simple
20 solution. Let's have this trial after the election and solve
21 the problem.

22 THE COURT: All right. Mr. Lauro, your point seems to
23 be that if Mr. Trump were threatening witnesses directly in
24 his statements or telling his followers to threaten witnesses,
25 that would be one thing, but him simply calling certain people

1 out doesn't rise to that level. But when Mr. Trump has
2 singled out certain people in public statements in the past,
3 hasn't that led to them being threatened and harassed, as
4 demonstrated in the statements attached by the government?

5 MR. LAURO: Your Honor, that's totally irrelevant.
6 I had Biden surrogates call me deranged and I've had all kinds
7 of --

8 THE COURT: No, no. Mr. Lauro, you signed on to this
9 case I assume with full awareness of what that would mean.
10 These are people who are doing their jobs. The transcripts
11 that were attached are people who were doing their jobs. And
12 the government's motion cites several of them who averred in
13 the kinds of statements that you've asked for under oath that
14 threats and harassment toward them had increased significantly
15 as a result of Mr. Trump's statements about them.

16 So this statement -- you know, your argument seems to be,
17 well, you know, he's just responding to criticism, he doesn't
18 have any control over what all these people out there are
19 doing, is disingenuous.

20 MR. LAURO: No, it's not, Your Honor. First of all,
21 those people are public officials and they signed up for it
22 too. Just like I signed up --

23 THE COURT: Really? Election poll workers?

24 MR. LAURO: Well, with respect to that, I mean, first
25 of all, there's no suggestion that President Trump in the

1 course of this case has ever done anything that amounts to a
2 threat or an incitement with respect to anyone, and they can't
3 show that and they haven't shown that.

4 There's no question that someone who is exercising First
5 Amendment speech can't control what others do. They just
6 simply can't. If we're going to have a society where someone
7 is going to be penalized for free speech because of what a
8 third party can do, then the First Amendment will no longer
9 mean anything. It will be exorcised out of the constitution.
10 So the bottom line here is that we have to tolerate -- we have
11 to tolerate as a free society a bit of colorful, vituperative
12 speech. The Supreme Court is filled with opinions along those
13 lines.

14 THE COURT: So if there's a little violence or some
15 threats, it's just the price we pay for robust debate?

16 MR. LAURO: Absolutely not, Your Honor. No one
17 condones violence or threats. Absolutely not. Those would be
18 unlawful. There's ways of dealing with that. And no one is
19 suggesting here that President Trump has suggested violence or
20 threats against anyone; otherwise we'd be dealing with much
21 different proceedings than a proposed censorship order. And
22 there's been no suggestion that he's violated his terms of
23 release or that he's threatened a witness or anyone else.

24 THE COURT: All right. I have some questions regarding
25 some hypothetical statements, but I'll hear from Ms. Gaston

1 first.

2 MS. GASTON: Your Honor, the Court does not have to
3 tolerate the defendant intimidating witnesses and polluting
4 the jury pool. In fact, it is the Court's duty to prevent
5 those things. And what Mr. Lauro is saying is that his client
6 is above the law, that he can say whatever he wants about this
7 case. That's the thing. The statements about Mr. Pence,
8 about Mr. Barr, about General Milley, about Mr. Raffensperger,
9 those were about them in the context of this case, because the
10 defendant isn't campaigning, he is using his campaign to try
11 to try this case outside of this courtroom and to pollute the
12 jury pool. And that is improper and the Court has an
13 obligation to stop it.

14 THE COURT: Mr. Lauro -- thank you.

15 Maybe it will help us establish some common ground, if
16 there's any to be found, if we were to use some examples. So
17 let me ask you about some hypothetical public statements, and
18 you tell me if you think it would be appropriate for Mr. Trump
19 to make them. Because the government has already used him as
20 an example of a potential witness, I'll use Mr. Barr as the
21 hypothetical subject of the statements just to keep things
22 simple.

23 So let's go through them. So first, "Bill Barr should be
24 executed for his many treasonous acts." Is that appropriate?

25 MR. LAURO: Are you asking me what's appropriate or

1 what's lawful?

2 THE COURT: If you think it would be lawful under the
3 existing conditions of release and whether you think it should
4 be permissible as a defendant facing a criminal trial. "Bill
5 Barr should be executed for his many treasonous acts."

6 I'm not asking if it's nice. I'm asking if you think he
7 should be allowed to make such statements.

8 MR. LAURO: Your Honor, first of all, again, I would
9 advise anyone not to make statements like that.

10 THE COURT: Why? Why?

11 MR. LAURO: Because I personally as an officer of the
12 court, okay, I personally as an officer of the court will
13 advise clients not to make statements like that.

14 THE COURT: And again, why would you advise a client --

15 MR. LAURO: Because I don't believe personally, okay,
16 as an officer of the court, that statements like that are --
17 necessarily need to be made in the context of a court
18 proceeding. However, you need to ask the second question,
19 does it violate the First Amendment --

20 THE COURT: No, no.

21 MR. LAURO: -- and the answer is no.

22 THE COURT: Well, you know, is it a threat?

23 MR. LAURO: It is not a threat, Your Honor.

24 THE COURT: Okay.

25 MR. LAURO: It's absolutely not a threat.

1 THE COURT: "I hope Bill Barr stays loyal to me or he
2 can forget about having a job in my next administration."

3 MR. LAURO: Your Honor, you're asking me hypotheticals
4 or things that were asked?

5 THE COURT: Hypotheticals. This is a hypothetical.

6 MR. LAURO: And when was that posted?

7 THE COURT: No. It's a hypothetical.

8 MR. LAURO: Was it posted during the time of this case,
9 or was it posted previously?

10 THE COURT: That's a statement that I am using as a
11 hypothetical. I don't know if it's been made before. But
12 assume your client was to make this statement during the
13 pendency of this case. Is that permissible?

14 MR. LAURO: Well, let me --

15 THE COURT: Or is that an attempt to influence the
16 testimony of a potential witness?

17 MR. LAURO: Well, here it's a clearly political
18 statement because it goes to the core of whether or not
19 somebody might have a position in a future administration.
20 So it certainly could be read understandably as I want Bill
21 Barr's support in the course of this campaign. And that I
22 think is fair game.

23 THE COURT: Okay.

24 MR. LAURO: And if Bill Barr is not supporting me in
25 the campaign, then he doesn't have a position in 2024. I

1 think that's fair game under the First Amendment.

2 THE COURT: Okay. Next hypothetical. "Bill Barr is
3 a smart guy, but he better learn to keep his mouth shut."
4 Permissible? Or an attempt to obstruct justice or intimidate
5 a witness?

6 MR. LAURO: Well, first of all, I'm grateful for these
7 hypotheticals.

8 THE COURT: Takes you back to law school.

9 MR. LAURO: Ones I didn't ask for. But as I would
10 tell the professor, it depends on the context, Your Honor.
11 And if it related to Bill Barr arguing with President Trump
12 and calling him out and calling him unfit for office, then
13 that might be a fair comment because Bill Barr has done that
14 repeatedly. Bill Barr has attacked President Trump perhaps
15 more vociferously than Joe Biden has, and the hypotheticals
16 you're giving me are fair comment and fair response within
17 that context.

18 Now, if it happened the day before Bill Barr testified at
19 trial, that might be a different hypothetical. But --

20 THE COURT: "Bill Barr is a slimy liar and can't be
21 trusted." Permissible?

22 MR. LAURO: Well, I'm not going to say truth is a
23 defense, but I'm also going to say --

24 (Laughter.)

25 -- that the bottom line is that President Trump, I believe

1 in his public statements, has said that he was not told the
2 truth by Bill Barr with respect to what happened with the
3 Department of Justice investigation.

4 Now, I know Bill Barr was facing unusual circumstances
5 because there were people embedded in the department, in the
6 public integrity section that were blocking him from doing
7 what he wanted to do. But the bottom bottom line is that
8 President Trump is allowed, I believe, under these
9 circumstances in the First Amendment, to comment on Bill
10 Barr's activity as attorney general. Are we going to say that
11 he can't do that in the middle of a campaign?

12 THE COURT: No. No. What we're talking about is
13 whether he's allowed to make comments that would go to
14 influencing or potentially influencing a witness's testimony
15 or intimidating or chilling that witness's participation.

16 MR. LAURO: I wish Bill Barr were here. He's a tough
17 guy. He's not going to say he's intimidated by anything that
18 President Trump has ever said. In fact, he's gone on TV
19 repeatedly, repeatedly saying that.

20 THE COURT: But it also has the effect of casting
21 into doubt the truthfulness or veracity of a potential witness
22 in a way that the government cannot and is not allowed to
23 respond to.

24 MR. LAURO: Your Honor, of course they can. Mr. Barr
25 can, the White House surrogates can. Everybody can. The

1 bottom line is that these are tough-edged political people.
2 Bill Barr, Mike Pence, Milley, Raffensperger, these are
3 politicians. These are people that are used to the rough and
4 tumble. They're not lilies that get offended by any little
5 comment about being deranged or otherwise. These are people
6 that have, as you have said, they signed up for it. They know
7 what they're talking about. And candidly, they're all
8 monetizing their relationship.

9 Do you think for a moment that anything President Trump
10 said prevented Mike Pence from writing a book, or Bill Barr,
11 or Mr. Raffensperger. General Milley is probably going to
12 write his own book as well.

13 THE COURT: Mr. Lauro, would your answers change if
14 Mr. Trump reposted or liked or re-truthed or whatever you call
15 it social media posts with those statements rather than
16 actually typing the words himself?

17 MR. LAURO: Well, I think if Your Honor were to give a
18 statement to counsel in terms of what Your Honor would like to
19 see in the course of these proceedings, that is something that
20 we would certainly communicate to President Trump in no
21 uncertain terms -- circumstances. But he should not be
22 prevented, should not be prevented from speaking his mind on
23 these issues.

24 And everything you have raised goes to what a vice
25 president should be, what an attorney general should be, what

1 a secretary of state in a state should be and what a member of
2 the joint chiefs of staff should be. These are all pressing
3 public issues. The public wants to know what kind of people
4 President Trump will have in his cabinet in 2024.

5 THE COURT: All right. Ms. Gaston?

6 MS. GASTON: Thank you, Your Honor. I will run through
7 your examples in order.

8 THE COURT: I think I know your answers.

9 MS. GASTON: So first, about Mr. Barr, "he should be
10 executed for many treasonous acts." The defendant should not
11 be able to do that because that is intimidating and
12 threatening toward a known witness in this case who is in the
13 indictment, and it could chill not only his speech, his
14 testimony, but those of others who are watching what happens
15 to more powerful people.

16 In terms of "I hope he stays loyal," that is intimidating,
17 it impinges on his credibility and the contents of his
18 testimony at trial, and it's potentially a violation of the
19 defendant's conditions of release because it could be seen as
20 an indirect message to a witness in this case.

21 The same goes for "he's a smart guy but he needs to keep
22 his mouth shut." That is intimidating, it has to do with his
23 potential testimony and credibility, and it could be a
24 violation of the defendant's conditions of release.

25 And again, the "slimy lawyer and cannot be trusted," that

1 goes to his credibility and the potential topics of his
2 testimony.

3 In addition to all of those, all of these statements could
4 cause these individuals to respond in kind, which is what has
5 happened in the past. When these individuals are attacked,
6 they have responded. And so that involves all of the details
7 of their potential testimony being out in the open in advance
8 of trial. And as the Court identified, the government does
9 not respond because it does not make extrajudicial comments
10 like the defendant has been.

11 As I mentioned before, it also -- these kinds of statements
12 also chill other witnesses. Mr. Lauro seems to suggest that
13 these powerful people have asked for these threats. But what
14 about other witnesses who don't live on a military base and
15 have constant protection? What are they to think about the
16 defendant's attacks publicly on more high-profile witnesses?

17 And Mr. Lauro again seems to be suggesting that the Court
18 should not enter an order because he'll just tell the
19 defendant what the Court wants. I think that's because
20 Mr. Lauro does not want this to be enforceable. The Court
21 should enter an order to protect the venire and to prevent
22 this case from being tried in the court of public opinion,
23 which is exactly the defendant's stated intent.

24 THE COURT: All right. I want to talk about the scope
25 of the government's proposed order, which would forbid

1 statements regarding the identity, testimony, or credibility
2 of prospective witnesses. And naturally, it may be possible
3 to infer the identity of a least some people who are likely to
4 be witnesses in this case. But the universe of prospective
5 witnesses seems quite large and almost certainly includes
6 public figures with whom Mr. Trump has public disagreements.
7 And his disagreement could reflect his view of the
8 credibility.

9 So how is he supposed to know with whom he can or can't
10 publicly disagree? And I'm considering the D.C. Circuit's
11 holding in *Morrison* with regard to the foreseeability of
12 evidence and witnesses.

13 MS. GASTON: Yes, Your Honor. As an initial matter,
14 the witnesses whom the defendant has publicly attacked to date
15 are all folks who are identifiable in the indictment, and so
16 he knows these are witnesses. But furthermore, in the
17 defendant's conditions of release there is a requirement that
18 he not contact any potential witnesses, and the government's
19 understanding is that the defendant is on notice of who are
20 potential witnesses based on the discovery that the government
21 has provided, which includes logs of the interviews that the
22 government conducted in the course of its investigation.

23 THE COURT: All right.

24 MR. LAURO: Your Honor, if I can very briefly. The
25 courts have recognized that individuals, parties to a lawsuit

1 who are involved in a political campaign are to be treated
2 differently. The courts have recognized that in *Brown* and in
3 *Ford*. There's no doubt that this is a different equation than
4 if we had a situation where President Trump was not running
5 for office. That's just a given fact, and that is the law.

6 Any kind of order would be asymmetrical in the sense that
7 Bill Barr could attack President Trump repeatedly during
8 campaign --

9 THE COURT: But again, Bill Barr is not a criminal
10 defendant. So, yes, there's going to be some asymmetry
11 because your client is subject to restrictions that Bill Barr
12 is not.

13 MR. LAURO: And both under *Ford* and under *Brown* the
14 courts decided that in order to protect the electoral process,
15 that censorship order should not be entered, full stop. Not
16 even a narrowly tailored order was entered in either one of
17 those cases during the campaign. So the Court would be
18 embracing new ground which no court has ventured into with
19 respect to First Amendment jurisprudence, which is entering
20 even some kind of order that would regulate campaign speech.
21 No court in the history of the United States has done that.
22 This would be the first time in the context of what's going on
23 in this case.

24 And Your Honor has struggled and you've asked me, you know,
25 pointed hypotheticals. But it's not really a law school

1 exercise, Your Honor; it's what's playing out in a campaign
2 right now. And what's going to happen if in the middle of a
3 heated debate President Trump says something about Mike Pence
4 or Bill Barr? Are we going to be back here on a motion for
5 contempt?

6 THE COURT: Depends on what he says.

7 MR. LAURO: And then what's going to happen? Is Your
8 Honor going to put President Trump in jail during the course
9 of a campaign? I mean, look what they've opened up here.
10 This is a massive can of worms. The better way to deal with
11 it, candidly, Your Honor --

12 THE COURT: Is to move the trial date until after the
13 election.

14 MR. LAURO: No, I wasn't going to say that only. No, I
15 wasn't just going to say that. I know you're mocking me, but
16 I wasn't going to say that. What I was going to say is that
17 we can also deal with it, if there's something that's said,
18 after the fact Your Honor can --

19 THE COURT: We're in here because of that. We're in
20 here because he keeps calling the prosecutors thugs, deranged,
21 because he's made comments about court staff, because he's
22 made comments about the death penalty for a potential witness.
23 We are in here today because of statements that he's made, not
24 just before the government filed its motion but after, right
25 up to last night. And so I -- I'm not confident that without

1 some kind of a restriction we won't be in here all the time.

2 MR. LAURO: Well, the reality is that everything that
3 he has said with respect to these issues are protected First
4 Amendment speech. So we're back to square one, Your Honor,
5 which is the reality is that he's entitled to do this under
6 the First Amendment as long as he doesn't violate the order of
7 the Court regarding his release and threaten or intimidate any
8 witness, which he hasn't done.

9 But in the context of a political campaign it's impossible
10 to fashion an order that is going to censor or control
11 political speech. And that's why, in both the *Brown* and the
12 *Ford* cases, circuit courts of appeal have recognized that no
13 such order should be entered.

14 THE COURT: All right. Ms. Gaston, I'll let you finish
15 since it's your motion, and then I want to take a short
16 recess.

17 MS. GASTON: Thank you very much, Your Honor. I just
18 briefly want to address what Mr. Lauro just said about those
19 two cases. First of all, the *Ford* case is a case in which the
20 court entered -- what the Sixth Circuit called "a broad
21 no-discussion-of-the-case order," and the Court did it sua
22 sponte. There was not a motion by the parties. There is
23 nothing in the decision along the lines of the incredibly
24 prolific and prejudicial statements that the defendant in this
25 case is making. So that is really not analogous to this case.

1 And then with respect to the *Brown* case, that is actually a
2 cautionary tale for the Court. In that case the court lifted
3 an order that was restricting the defendant's extrajudicial
4 statements. And soon after he did, they began to disseminate
5 evidence from the case, recordings, and to talk about it. And
6 he had to implement another order.

7 It's also important to remember that *Brown* happened in the
8 last two months leading up to that election. Here our trial
9 will be completed well in advance of November 2024.

10 It is important to emphasize again that the statements at
11 issue here, these statements that we have been discussing are
12 a fraction of the defendant's speech. He is talking about the
13 actual issues of the campaign freely, and he will be able to
14 continue to do so. And he's demonstrated his ability to
15 regulate his speech, as I said before. All the government
16 wants is for him to stop attacking witnesses in this case and
17 prejudicing the venire.

18 THE COURT: All right. Thank you all. I'm going to
19 take a brief recess.

20 (Recess from 11:56 a.m. to 12:18 p.m.)

21 THE COURT: All right. Thank you for the argument and
22 the briefing. After this hearing concludes I will issue an
23 order setting forth my ruling on the government's motion in
24 greater detail, but for now I will share the basic contours of
25 my decision.

1 First, as already noted, I am going to deny the
2 government's motion with respect to imposing additional jury
3 pool survey requirements. The defense has already agreed to
4 notify me of the dates and sample sizes of surveys for this
5 case, and I'm not going to require anything more.

6 Second, I am going to grant in part and deny in part the
7 government's motion with respect to additional restrictions to
8 be placed on out-of-court statements by the parties or their
9 counsel.

10 The defense has sought to represent every statement as part
11 and parcel of Mr. Trump's First Amendment right to argue that
12 this prosecution is politically motivated. One could come
13 away from these arguments with a mistaken understanding that
14 the First Amendment is an absolute right.

15 That is false. First Amendment protections yield to the
16 administration of justice and to the protection of witnesses.
17 That is in fact the standard the defense took in its brief
18 when it acknowledged that some speech could be prohibited.

19 There is a compelling interest in the administration of
20 justice and in protecting potential witnesses in this case,
21 and it is possible to craft a narrowly tailored order to serve
22 that interest.

23 This is not about whether I like the language Mr. Trump
24 uses. This is about language that presents a danger to the
25 administration of justice. Accordingly, I will not impose any

1 additional restrictions about statements regarding the
2 District of Columbia or its jury pool. I am confident that
3 the voir dire process and cautionary jury instructions can
4 filter out those statements' influence on the jury. To the
5 extent that Mr. Trump continues to cast aspersions on the city
6 and its residents, his statements will be considered in
7 assessing any future motion for a change of venue.

8 I will not impose any additional restrictions on statements
9 criticizing the government generally, including the Biden
10 administration or the Justice Department, or statements
11 communicating that Mr. Trump believes this prosecution to be
12 politically motivated.

13 I will, however, prohibit all parties, including Mr. Trump,
14 along with the attorneys in this case, from making or
15 reposting any statements publicly targeting the special
16 counsel, his staff, including government counsel here today,
17 as well as any statements publicly targeting any of my staff
18 or any other court personnel. It should go without saying
19 that statements targeting the families of any of these people
20 are absolutely prohibited as well.

21 Mr. Trump can certainly claim he's being unfairly
22 prosecuted, but I cannot imagine any other criminal case in
23 which a defendant is permitted to call the prosecutor
24 "deranged" or "a thug," and I will not permit it here simply
25 because the defendant is running a political campaign. His

1 presidential candidacy does not give him carte blanche to
2 vilify and implicitly encourage violence against public
3 servants who are simply doing their job.

4 Finally, I will also prohibit statements from all parties
5 and attorneys about potential witnesses or the substance of
6 their expected testimony. If Mr. Trump wants to criticize his
7 political rival, Mr. Pence, he may do so. But he cannot make
8 statements about Mr. Pence's role in the events underlying
9 this case.

10 My review of past statements made by Mr. Trump in
11 particular, as well as the evidence that they have led to
12 harassment and threats for the people he has targeted,
13 persuades me that without this restriction there is a real
14 risk that witnesses may be intimidated or unduly influenced
15 and that other potential witnesses may be reluctant to come
16 forward lest they be subjected to the same harassment and
17 intimidation.

18 Now, let me be clear: Mr. Trump may still vigorously seek
19 public support as a presidential candidate, debate policies
20 and people related to that candidacy, criticize the current
21 administration, and assert his belief that this prosecution is
22 politically motivated. But those critical First Amendment
23 freedoms do not allow him to launch a pretrial smear campaign
24 against participating government staff, their families, and
25 foreseeable witnesses. No other criminal defendant would be

1 allowed to do so, and I am not going to allow it in this case.

2 For the reasons discussed during this hearing, therefore, I
3 find that these measures are consistent with the rights
4 secured by the First, Fifth, and Sixth Amendments, and that
5 they are both necessary and narrowly tailored to safeguard the
6 integrity of these proceedings as well as to protect the
7 safety of the people assisting with them.

8 If any party or counsel violates these restrictions or the
9 other laws or obligations by which they are bound, I will,
10 either upon receipt of a motion or sua sponte, consider
11 sanctions as may be necessary.

12 Thank you. We're adjourned.

13 (Proceedings adjourned at 12:25 p.m.)
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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Bryan A. Wayne
Bryan A. Wayne