2024 M. Gene Blackburn Award presented to Nadia Valentine

This annual cash award, funded by the Cedar Rapids, Iowa law firm of Simmons Perrine Moyer & Bergman, is presented to the student who submits the best brief for the Supreme Court Celebration Moot Court Competition. The recipient is chosen on the basis of superior writing skills that communicate an issue position based upon an innovative, creative, and concise approach.

The award is named for M. Gene Blackburn, LW'55, in recognition of his dedication to the development of appellate advocacy while a professor at Drake Law School.

The Supreme Court Competition

Each year, outstanding advocates in the Law School compete in the Supreme Court Competition for the honor of presenting final arguments to the Iowa Supreme Court. The problem is based on a real case, using an actual record that was pending before an appellate court and involving an unresolved legal issue, thus giving competitors a realistic experience.

The competition is open to second- and third-year law students and consists of writing a brief and arguing in two preliminary rounds. The competition has been incorporated into an Appellate Advocacy skills course that provides students with an opportunity to develop their persuasive writing and oral advocacy talents. The brief-writing process has been supplemented with an ongoing, in-depth discussion of best practices in appellate briefing, and the preliminary rounds were preceded by a series of practice rounds that enabled students to sharpen their advocacy skills and prepare to give the very best version of their arguments. The top four advocates based upon the scores from the preliminary rounds advance to the final round before the Iowa Supreme Court. The award for Best Oralist in the final round is announced at Drake Law School's annual Supreme Court Celebration Banquet.

2024 Supreme Court Competition Problem

Morgan Sluff is a firebrand labor activist with large followings on social media. She was the social media director for Iowa's largest union. The State charged her with extortion. The minutes of testimony (which Sluff has received) say that the State expects to present testimony from Peter Pastures, a member of that union's executive board. The State expects Pastures to testify that Sluff threatened that she would expose his extramarital affair unless he voted to approve her salary increase.

Almost immediately upon receiving the minutes of testimony, Sluff began posting about Pastures on social media. Her posts claimed that Pastures was "going to lie" in court, just like he "lied to his wife in his wedding vows." She insinuated that he had more than one extramarital affair. She also referred to him as "Perjury Petey." Sluff also made posts about the prosecutor, a county attorney by the name of John Doe. Sluff
declared that the county had a "rat problem," and she announced that she was running for county attorney to replace Doe because "Dallas County deserves . . . [s]omeone who can say NO to a political hit job and someone who a jury can BELIEVE." She added that "[d]angerous criminals keep getting away with MURDER because every juror knows they can't believe a word from JOHN D'OH!" Sluff mentioned Pastures, Doe, or both in more than 2,000 posts over 49 days.

The State moved for an order to restrain Sluff from making public statements about Pastures or Doe during the pendency of this prosecution. Sluff resisted. The district court applied the three-part test from the DC Circuit's decision in *United States v. Trump.* As to Sluff's statements pertaining to each person, the district court considered:

(1) whether a gag order would be justified by a sufficiently serious risk of prejudice to an ongoing judicial proceeding; (2) whether there were any less restrictive alternatives that would adequately address that risk; and (3) whether the gag order that it contemplated was narrowly tailored to address that prejudice without burdening more speech than necessary to do so. Ultimately, the district court granted the State's request (mostly). It issued an order that prohibited Sluff from making any public posts about Pastures during the pendency of this prosecution. Its order also prohibited Sluff from making public statements about Doe that referenced this ongoing criminal proceeding (she could still make statements about Doe that did not contain any reference to this prosecution).

Sluff appeals from that order. Her advocacy emphasizes the primacy of her First Amendment right to free speech, especially when it concerns matters of public concern. The State counters with its interest (and the judiciary's interest) in a fair trial, which often requires courts to act to protect witnesses and potential jurors from being influenced by extrajudicial pressures and contaminants. Resolving these challenges will require trade-offs, and none of them are completely satisfying. The Iowa Supreme Court will have to chart its own course through these choppy waters, with whatever navigational assistance they can get from our intrepid student advocate.

IN THE SUPREME COURT OF IOWA
Supreme Court No. 22–9000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MORGAN SLUFF
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DALLAS COUNTY
THE HONORABLE TERRY TWILLSTEEN, JUDGE

APPELLEE'S BRIEF

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ATTORNEY FOR PLAINTIFF-APPELLEE

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. A court may act to prevent improper influences from affecting a proceeding. The defendant has continuously posted about the witness in her upcoming criminal trial, calling into question his trustworthiness. After being instructed to exercise caution when posting, the defendant intensified posts about the witness. Did the court err by issuing an order to prevent the defendant from intimidating a witness and impacting ongoing proceedings?

Authorities

Broadrick v. Okla., 413 U.S. 601 (1973)
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Iowa R. App. P. 6.1101
Iowa R. Crim. P. 2.11
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United States Census Bureau, https://www.census.gov/quickfacts/fact/table/dallascountyiowa

II. Courts are permitted to limit speech of trial participants when there is a substantial likelihood of material prejudice to the proceeding; no less restrictive alternatives apply; and when the order is narrowly tailored. The defendant continued to post about the prosecutor's credibility after the court instructed the defendant to stop. Did the court err by issuing an order to prevent the defendant from making further inflammatory posts that risk contaminating the jury pool?

Authorities

Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976)
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Number of followers of Donald Trump on select social media platforms as of January 2023
Target, Merriam-Webster Online, https://www.merriamwebster.com

ROUTING STATEMENT

The issues presented in this case are substantial issues of first impression. Accordingly, it is appropriate for this case to be retained by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case

Morgan Sluff is seeking reversal of a district court decision that restrained her ability to post prejudicial information about individuals involved in her upcoming criminal trial.

In this appeal, Sluff argues that the order restraining her speech about Peter Pastures and John Doe is unconstitutional because: (1) her posts do not create a substantial risk of material prejudice; (2) less restrictive alternatives have not been properly considered; and (3) the order is not narrowly tailored.

Statement of Facts

Morgan Sluff is an outspoken union enthusiast who has amassed an extensive social media following. R. at 1. She has more than 500,000 followers on X; an even larger number on Instagram; and over 2 million on TikTok. R. at 1. Until recently, she was the social media director for Teamsters Local 238, Iowa's largest union.

R. at 1. In addition to maintaining popular social media accounts, Sluff is alleged to have committed extortion. R. at 2. Sluff called Peter Pastures, a Teamsters executive board member, and threatened to expose his intimate secrets unless he voted to increase her salary. R. at 2. He is now a witness in her criminal case. R. at 2. Since the criminal complaint was filed, Sluff has been relentless on social media. R. at 2. Sluff's posts have consisted of the following:

> "Peter Pastures lied to his wide in his wedding vows (UNFAITHFUL) now he's going to lie about me in court. This bogus case NEVER should have been brought, because I DID NOTHING WRONG! Dallas County has a rat problem and the rat's name is CORRUPT JOHN DOE."

R. at 2. When the metrics of that post were captured, it had 63 retweets, 39 quote tweets, and almost 3,000 likes. R. at 2. After Sluff's initial aggressive posts, the State attempted to curb her allegations. R. at 2. The State requested an order that would prevent Sluff from making further statements about Peter Pastures, the witness, and John Doe, the Dallas County Attorney. R. at 2. In the five days leading up to the hearing, Sluff posted more than 200 times about Doe and Pastures. R. at 2. On average, she was making 40 posts every single day. R. at 2. The court gave Sluff an opportunity to correct her behavior.

Instead of granting the order, the court instructed all parties to avoid making public statements that may be prejudicial. R. at 3. Sluff ignored the advice of the court. She posted an hour after that hearing to declare that it was a "full vindication and exoneration." R. at 4. Sluff also announced that she would be running against John Doe for the Dallas County Attorney election in June 2024. R. at 4. Sluff's posts continued, and even intensified. R. at 9. Between September 12 and October 31, Sluff published more than 2,000 posts about Pastures and Doe. R. at 4. Once again, Sluff was averaging around 40 posts a day. One post read:

> "Pete Pastures is a cheater and a liar. He had tears in his eyes when he begged me not to tell anyone about his affair (NOT THE ONLY TIME). I told him that I would give him time to tell his wife. NO EXTORTION. At least now everyone will finally learn the truth about Perjury Petey!"

R. at 4. That post garnered 166 retweets; 340 quotes tweets; and 3,000 likes. R. at 4. To capture the frequency of Sluff's posts, the State used a bot that took a screenshot of each post one hour after it was posted. Within one hour, that post had 3,000 likes—an average of fifty 'likes' per minute. Further, the metrics captured in the screenshots do not reflect the actual

engagement metrics that the post achieved. R. at 4. As mentioned previously, Sluff announced her candidacy for Dallas County Attorney. R. at 4. She used her social media platform to challenge her opponent, John Doe. R. at 5. In one instance, she posted:

> "Dallas County deserves a better County Attorney than CORRUPT JOHN DOE. Someone who can say NO to a political hit job and someone who a jury can BELIEVES. Dangerous criminals keep getting away with MURDER because every juror knows they can't believe a word for JOHN D'OH!"

R. at 5. Concerned for the integrity of judicial proceedings, the State filed a new motion, seeking an order that would prevent Sluff from making further public statements about Doe and Pastures in connection with her criminal case. R. at 5. The State acknowledged that Sluff's posts could contaminate the jury pool. R. at 5. Additionally, Pastures could be influenced or pressured not to testify because he was a target of the posts. R. at 5. Sluff argued that her posts were not targeted. R. at 5. Further, because she declared her candidacy for office, her posts qualified as protected political speech. R. at 5. Neither Pastures nor Doe have received threats because of Sluff's posts. R. at 6. But the social media accounts for Teamsters Local 238 have been flooded with messages that demand Pastures be

fired. Sluff's supporters even refer to him as Perjury Petey, the nickname she coined. R. at 6.

To determine whether an order restricting Sluff's speech is proper, a district court must consider three factors: (1) Whether Sluff's hostile messages posed a serious risk of material prejudice to the proceedings; (2) If there were any reasonable alternatives to limiting her speech after Sluff disregarded the court's initial suggestion; (3) If the first two requirements are satisfied, an order restricting speech is proper. But it must be narrowly tailored to address the risk. R. at 7. The district court's order satisfied all three requirements. It prevents Sluff's harmful rhetoric whilst catering to her First Amendment freedoms.

Course of Proceedings

In September of 2023, the State moved for an order that would prohibit Morgan Sluff from making certain comments relating to a witness and the County Attorney in her upcoming criminal trial. The court did not grant the motion, and instead instructed all parties to exercise caution when making public statements.

On December 1, 2023, the State filed a new motion for an order prohibiting Sluff from making comments about Doe and Pastures that

relate to her criminal case. The district court issued the order on December 11. The order barred Sluff from making "any public statements, or directing others to make any public statement, that target Peter Pastures or are about Peter Pastures." R. at 17. Additionally, Sluff was prohibited from "making any public statements, or directing others to make any public statements, that reference both Doe and this particular criminal proceeding." R. at 17.

Sluff filed an application for discretionary review. She also applied for a stay of the order and a stay of the trial proceedings. This Court granted Sluff's application for discretionary review. The Court granted in part and denied in part the application for stay. The gag order is not stayed and remains in effect during the appeal process.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's ruling. The order that restrained Morgan Sluff's harmful speech was valid. The first issue to be addressed is whether Sluff's speech must pose a substantial likelihood of material prejudice to the proceedings or whether the heightened "clear and present danger" standard applies. Courts have limited authority to regulate the speech of the media or mere strangers to litigation. To impose an order restricting speech on

one of those parties, there must be a clear and present danger to the proceedings. But for an individual directly involved in a case, like a defendant, courts have greater authority to regulate that speech. Because Sluff is a direct participant in the litigation, her extrajudicial comments only need to satisfy the "substantial likelihood of material prejudice" standard. Sluff's posts accomplished this. Even though she argued that her posts were not targeted at Pastures, there is still a chance that he may be influenced not to testify or to change his testimony because of Sluff's backlash. Because Sluff publicized that Pastures is testifying against her, Sluff's posts can be interpreted as intimidating a witness—a clear interference with the judicial proceedings. Pastures has not received any direct threats or harassment. But that is not required. The only threat that is required before a gag order may be implemented is a threat to the overall proceedings.

Sluff's inflammatory posts about Doe risk tainting the jury pool, another example of material prejudice. Sluff is well within her rights to express dislike of Doe's policies, but she cannot paint him as the corrupt "rat" prosecutor who will ultimately try her case. That language goes beyond mere commentary about her political

opponent. Because Sluff is so popular on social media, her words hold a great amount of weight. Instead of using her platform to promote the union, Sluff has created an editorial artillery, aimed directly at Pastures and Doe. The court cannot allow its processes to be undermined by Sluff's extrajudicial speech.

The second requirement is to consider whether there are any less restrictive alternatives that can be implemented. The district court properly considered and rejected those options. Initially, the court requested that Sluff practice self-restraint and avoid making public statements that could prejudice the proceedings. Sluff ignored the court's recommendation. In fact, her posts intensified. The court then turned to other common alternatives: change of venue, delay of trial, and voir dire. None of these options can appropriately combat Sluff's behavior.

In cases where there is extensive coverage, change of venue cannot serve as a reasonable alternative. On average, Sluff is posting about her case 40 times a day on X. Additionally, her X followers exceed half a million. Dallas County's population is only 108,016. Even if every person in Dallas County followed Sluff, there are still almost 400,000 other people who live outside of Dallas County who

follow her. Because Sluff is in charge of the social media accounts for Iowa's largest union, a vast majority of her followers are likely Iowans, thus making change of venue ineffective. Further, a different venue would not erase any of Pastures' nerves about testifying. He has been named in Sluff's posts and continuously targeted by someone with significant influence. A change of venue would not be nearly as effective as an order that prevents Sluff from circulating allegations that promote an environment of intimidation. Change of venue would also not be helpful to Doe. Under Iowa law, the prosecuting attorney in the original jurisdiction will oftentimes remain as the prosecutor in the new jurisdiction. The prejudice that Sluff singlehandedly promoted would follow Doe regardless of the trial's location. Lastly, there are costs associated with a venue change that Dallas County would be responsible for. Moving to a new county would not address the true problem—Sluff's speech. The combination of Sluff's platform and its accusatory content silence any argument for change of venue.

Another alternative is delay of trial. Because Sluff is campaigning against Doe for Dallas County Attorney, she argued that her trial should be delayed until after the 2024 general election. Sluff

also offered case law that recommended a delay of trial until media coverage has subsided. The district court rejected this option, explaining that Sluff's posts would go unchecked for an even longer period if the trial was postponed. Further, Sluff ignored the court's initial safeguard of self-restraint. It is unconvincing to suggest that she would stop posting about Doe and Pastures if her trial was delayed. Instead, it creates an incentive for her to cultivate a greater social media following while posting prejudicial opinions about Pastures and Doe.

The third alternative is extensive questioning during voir dire. This option also fails as a reliable safeguard because of Sluff's biased comments and audience size. Voir dire presents a short amount of time for an attorney to determine whether a potential juror is being honest. Sluff will argue that, in cases of pervasive pre-trial publicity, counsel is granted more latitude to ask questions that may weed out potential bias. But Sluff has spent months painting Doe as corrupt and untrustworthy. Therefore, jurors may not feel like he is entitled to their honest opinions of him or the case.

The first two prongs of the analysis have been satisfied. Sluff's speech poses a substantial risk of material prejudice to upcoming

proceedings. Additionally, there are no less restrictive alternatives. An order limiting her speech is warranted. The order must be narrowly tailored to ensure that the harm caused by Sluff is mitigated whilst also assuring that her First Amendment rights are not violated. The district court restricted all speech about Pastures. Sluff's argument relies on the court of appeals' finding in *Trump*. The court in that case found that an order preventing speech about any potential witness was overbroad. But there were different issues at play in the *Trump* case. For example, several of the anticipated witnesses are high-ranking government officials. Other potential witnesses have written books about Trump or sat for interviews to discuss him. Pastures is neither a high-ranking public official nor an author who has published books about Sluff. Sluff's social media following makes Pastures more vulnerable, especially considering that she claims to know secret information about him. The only way to ensure that Sluff's trial will be free from outside influence is to limit her damaging speech about the sole witness.

The order is also narrowly tailored with respect to Sluff's comments about Doe. Because Sluff is now his political opponent, the district court paid careful attention in crafting the requirements. Sluff

is permitted to challenge Doe's policies and platforms as the current Dallas County Attorney. She may still campaign and offer her opinions on his shortcomings. But she is barred from making public comments about his role as the prosecutor in connection with her criminal case. The order is effective in restricting speech that will prejudice the proceedings. But the order also permits Sluff to effectively campaign for the Dallas County Attorney position.

The district court's order was proper. Sluff's speech undermines judicial integrity. Because of her willingness to continue posting inflammatory statements, all less restrictive alternatives are inadequate. Further, the order successfully addresses Sluff's harmful commentary but also ensures that she may effectively campaign for Dallas County Attorney.

ARGUMENT

I. The district court's order restraining Sluff's public comments about Peter Pastures does not violate the First Amendment because the government has a compelling interest in preventing undue influence on witnesses. None of the available alternatives would effectively address the threat of material prejudice. Further, the order was narrowly tailored because Sluff cannot target the witness, but she can still declare her innocence.

Preservation of Error

Error was preserved when Sluff raised arguments that were also made in *United* States *v. Trump*. *See United States v. Trump*, 88 F.4th 990 (D.C. Cir. 2023).

Standard of Review

A ruling on the constitutionality of a gag order is reviewed de novo. The district court's findings will only be overturned for clear error. *Trump*, 88 F.4th at 996.

Merits

Sluff's right to free speech is not absolute. A court has the power to act when a party's actions may jeopardize "the very purpose of a court system." *Sheppard v. Maxwell*, 384 U.S. 333, 350-51 (1966). Sluff's posts about Peter Pastures have a significant likelihood of "deterring, chilling, or altering the involvement of other witnesses,"

thereby posing a serious risk to the ongoing proceedings and warranting a restrictive order on her extrajudicial speech. *Trump*, 88 F.4th at 996. Under *Nebraska Press and Gentile*, courts consider the following to determine whether a gag order is constitutional:

> (1) whether the order is justified by a sufficiently serious risk of prejudice to an ongoing judicial proceeding;
> (2) whether less restrictive alternatives would adequately address that risk; and
> (3) whether the order is narrowly tailored, including whether the order effectively addresses the potential prejudice.

Id. at 1007. The district court's order satisfies all three requirements.

A. Because Sluff is directly involved in the litigation, the limit on her speech is subject to the "substantially likely" standard, not the "clear and present danger" standard.

There is a significant distinction between restrictive orders placed on trial participants and orders placed on the media. Any such order against the press is considered prior restraint and is subject to intense scrutiny. For a gag order against the media to be found constitutional, there must be a "clear and present danger" that the media coverage will impact the defendant's ability to receive a fair trial or that the speech will cause a malfunction in the criminal justice system. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991).

The clear and present danger classification is reserved for "only the gravest abuses." *Weaver v. Jordan*, 411 P.2d 289 (1966). The argument that Sluff's speech must display a clear and present danger is unavailing. The standard is only applied to statements made by strangers to the litigation—not direct participants. *Gentile*, 501 U.S. at 1072-73. If Sluff were not the defendant in the present case, her posts would need to create an imminent and likely threat to the proceedings to meet the "clear and present" danger standard. The Supreme Court has never ruled that district courts must apply that standard "before the court can forbid extrajudicial statements about the trial" made by trial participants. *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir. 1969).

District court judges have much greater authority to restrict the speech of parties to the ongoing proceedings. *Trump*, 88 F.4th at 1005. For example, in *Seattle Times Co. v. Rhinehart*, the Supreme Court held that a newspaper, which was the defendant in a libel action, could be barred from publishing material about the plaintiffs that was gained through discovery. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984). In *United States v. Brown*, the Fifth Circuit concluded that "clear and present danger" is not the applicable

standard when evaluating gag orders on trial participants. *United States v. Brown*, 218 F.3d 415, 428 (5th Cir. 2000). Instead, the proper test is whether the speech creates a substantial likelihood of material prejudice. *Id.* The standard applies to individuals directly involved in the litigation. *Id.* Namely, lawyers, defendants, and witnesses. *Id.*

Material prejudice encompasses two principals: (1) statements that are likely to influence the actual outcome of the trial; and (2) comments that are likely to prejudice the jury venire even if an untainted panel can ultimately be found. *Gentile*, 501 U.S. at 1075. *See In re State-Record Co., Inc.,* 917 F.2d 124, 128 (4th Cir. 1990) ("Orders restricting parties, witnesses and attorneys from discussing a pending case with the press are not unusual.").

This standard applies to Sluff because she is the defendant in ongoing litigation. Her frequent and inflammatory social media posts about Peter Pastures are likely to influence the outcome the trial, whether that be in the form of Pastures refusing to testify or the jury writing him off as an untrustworthy witness. Secondly, the popularity of her online accounts increases the likelihood of a biased jury. In balancing the importance of a fair trial and Sluff's First Amendment

rights, the district court was proper in applying the substantial likelihood test and regulating Sluff's extrajudicial comments.

B. Sluff's posts are substantially likely to affect the proceedings because of their inflammatory language.

Sluff argues that her posts are not directed at Peter Pastures. R. at 8. But when a defendant publicizes witness names and testimony, courts view the act as an attempt to intimidate or threaten the witness. *United States v. Brisbin*, 659 F. App'x. 903, 906-07 (8th Cir. 2016). In *United States v. Katsman*, the defendant's plea agreement was abandoned after the defendant made a Facebook page to denounce a cooperating witness. *Katsman*, 551 Fed. Appx. 601, 604 (2d Cir. 2014)(unpublished). The Second Circuit ruled, "Regardless of truth, publicizing the cooperation of another person in the criminal process can have serious consequences." *Id.*

The district court in *Trump* relied on similar logic when it imposed a gag order. Three days after former President Donald Trump was indicted for his efforts to overturn the 2020 election, he used social media to make disparaging comments about witnesses. Trump referred to a foreseeable trial witness as "delusional" and "not a very good person." Brief for Appellee at 5, *United States v. Trump*,

(D.C. Cir. Dec. 8, 2023) (No. 23–3190). He went on to label other unfavorable testimony as lies. *Id.* at 17. Trump's massive social media presence and his loyal followers created an environment ripe with witness intimidation. *Id.* at 5. The district court emphasized that the attack on potential testimony can be interpreted as "an attempt to influence or prevent the witness's participation in this case." *Id.*

Even if Sluff succeeded in arguing that she did not direct her posts at Pastures, the district court was still proper in limiting her speech. The court in *Trump* acknowledged that posting about a witness on social media "imperils the availability, content, and integrity of witness testimony," especially if the message of the post will reach the witness. *Trump*, 88 F.4th at 1013. Just like in *Trump*, the language used in Sluff's posts can be interpreted as an attempt to influence Pasture's participation in the case. In her X post on September 17, Sluff referred to Pastures as "Perjury Petey," undermining his credibility and truthfulness. R. at 4. Just like in *Trump*, Sluff's followers amplified the messaging in her posts. In her September 6 post, Sluff wrote, "Peter Pastures lied to his wife…now he's going to lie about me in court." R. at 4. On X, it garnered three thousand likes; 340 quote tweets; and 166 retweets. R. at 4. Sluff's X

account alone boasts over half a million followers. R. at 1. Even more troubling is the fact that the three thousand likes does not reflect the final number of individuals who engaged with the post. R. at 4.

And just like in *Trump*, Sluff's actions are severe enough to trigger an order that limits her speech. The court in *Trump* noted that a defendant is well within his or her right to claim unfair prosecution, which Sluff has also done. Brief for Appellee at 13, *United States v. Trump* (No. 23–3190). R. at 2. But a defendant may not "launch a pretrial smear campaign against participating government staff . . . and foreseeable witnesses." Brief for Appellee at 14, *United States v. Trump* (No. 23–3190). Sluff's continuous and accusatory posts about Pastures are just that—a social media smear campaign against a witness.

1. Direct threats are not required for a gag order to be proper.

In the *Trump* opinion, the court discussed the consequences of Trump's disparaging comments. Witnesses and other trial participants who were named in Trump's tweets became the targets of relentless harassment. One election commissioner received threats from individuals who knew his home address and the names and ages of his children. Brief for Appellee at 6, *United States v. Trump*, (D.C.

Cir. Dec. 8, 2023) (No. 23–3190). One state judge needed police protection after Trump posted about him. *Id.* Another judge's chambers received threatening phone calls, emails, and packages. *Id.* In granting the order to limit Trump's speech, the court emphasized that witnesses faced a substantial risk of intimidation and undue influence because of the harassment by Trump's followers. *Id.* at 13.

It is uncontested that Pastures has not received any direct threats. R. at 6. But a witness does not, and should not, have to endure such harassment for the antagonist's speech to be limited. *See United States v. Maurstad*, 35 F.4th 1139, 1146 (8th Cir. 2022) (affirming obstruction enhancement based on the defendant's "attempt to publicize witness names," and explaining that "a direct threat" is not required). The only threat required is a threat to the proceedings. Intimidating a witness by continuing to publish posts about him to an audience of over half a million followers presents a threat to the proceedings. Therefore, the district court was correct in restraining Sluff's speech, even if there were no direct threats against Pastures.

C. No less restrictive means would be effective because Sluff continues to post about Pastures after the judge advised her otherwise.

Sluff was given a previous opportunity to modify her behavior online. During the hearing on September 10, the State moved for an order that would prohibit Sluff from making public statements about known witnesses. R. at 2. The state offered more than 200 of Sluff's posts that mentioned either Peter Pastures, John Doe, or both. R. at 2. Instead of granting the order, the court cautioned all parties from making potentially prejudicial public statements for the remainder of the case. R. at 3. Sluff was presented with a less restrictive alternative—self regulation. R. at 9. Sluff continued to post about Pastures and Doe. R. at 4. In fact, between September 12 and October 31, Sluff published over two thousand posts that targeted Pastures and Doe. R. at 4. Self-regulation was unsuccessful, to say the least.

2. Change of venue is not an effective alternative because of Sluff's social media reach.

Sluff argues that other alternatives are more suitable. One option is to move the trial to a different location. Courts have found that when a case receives extensive publicity, change of venue is not an effective solution. In *Commonwealth v. Simmons*, Ernest Simmons was charged with first degree murder. *Commonwealth v.*

Simmons, 17 Pa. D. & C.4th 625, 626 (C.P. 1992). At a hearing, defense counsel made a motion for the court to close the upcoming pretrial conference to the public and the media. *Id*. at 627. The Commonwealth granted the request for closure, citing the defendant's right to a fair trial. *Id*. Members of the media argued that the public's right to attend the hearing did not infringe on the right to a fair trial. *Id*. If it did impact the trial, the court could simply rely on reasonable alternatives, like change of venue. *Id*. at 635. The court disagreed, acknowledging that once the information disclosed at an open hearing is part of the public domain, the publicity is likely to follow the case to a new venue. *Id*. The court further explained, ". . . it is impossible to believe that with all the past pre-trial and anticipated future publicity, the bell can be un-rung." *Id* at 635-36.

Like in *Simmons*, trying Sluff's case in a different jurisdiction would not be effective. As of 2022, Dallas County, Iowa has a population of 108,016.[1] Even if every person in Dallas County followed Sluff on X, there are still over 390,000 other individuals who follow her account who are located elsewhere. Sluff is the social media

[1] United States Census Bureau, https://www.census.gov/quickfacts/fact/table/dallascountyiowa/PSP045222#PST045222.

director for Iowa's largest union, so it is likely that a significant portion of her followers are Iowans. R. at 1. Because Sluff's following transcends Dallas County, the effects of her posts may bleed into other counties. A change of venue cannot undo the impact of Sluff's social media presence, nor can it ease any of Pastures' nerves about testifying. Further, under Iowa law, the transferring county must pay the receiving county for all expenses incurred during the trial. Iowa R. Crim. P. 2.11(11). Dallas County would therefore be responsible for the cost. *Id.* An order that prohibits further extrajudicial comments about Pastures is far more practical than a change of venue that requires Dallas County to foot the bill.

3. Postponing the trial would be counterproductive because Sluff will only continue to publish prejudicial statements about Pastures.

Courts have found that when a defendant targets witnesses repeatedly, a delayed trial only compounds the problem. *United States v. Trump*, 88 F.4th 990, 1018 (D.C. Cir. 2023). In *Trump*, the former President sought a delay of trial. Brief for Appellee at 2, *Trump*, (D.C. Cir. Dec. 8, 2023) (No. 23–3190) Trump requested that the trial be postponed until April of 2026. *Id.* The court repeatedly denied that requests for two reasons. *Trump*, 88 F.4th at 1018. First,

the court recognized that Trump's public commentary about trial participants would "go unchecked for an even longer pre-trial period." *Id*. If the court allowed the trial to be postponed, Trump would only have more time to make remarks targeting those involved in his prosecution. *Id*. Secondly, the court acknowledged that by delaying the trial, it would incentivize criminal defendants to engage in harmful speech to delay their prosecution. *Id*.

Sluff continued to post about Pastures even after the district court judge advised all parties to exercise caution in public statements. R. at 9. It is unconvincing, then, to suggest that Sluff's comments about Pastures would decrease or stop altogether if the trial date was postponed. To delay Sluff's trial would only enable her to foster a larger audience, thereby inviting more individuals to consume her anti-Pastures posts. Like the court in *Trump* discussed, a postponed trial would mean that Sluff's comments go unchecked for an even longer period. Sluff could use that time to tilt the scales of public opinion in her favor.

D. The district court's order was narrowly tailored because Sluff is not prohibited from making any public statements. She is only prohibited from making public statements about Pastures.

A limitation on First Amendment freedoms must be "no greater than is essential to the protection of the particular governmental interest involved." *Brown*, 218 F.3d at 429 (citing *Procunier v. Martinez*, 416 U.S. 396, 398 (1974)). *See also Dippolito v. State*, 225 So. 3d 233 (Fla. 4th DCA 2017) (holding that a "gag order must be narrowly tailored to achieve the objective sought, namely, a fair trial."). To determine whether a restraint on extrajudicial statements is narrowly tailored, courts look to whether the order contains "any time or scope limitations." *Dippolito*, 225 So. 3d at 242 (citing *Rodriguez by & Through Posso-Rodriguez v. Feinstein*, 734 So. 2d 1162 (Fla. Dist. Ct. App. 1999)). For example, in *United States v. Brown*, the extrajudicial comments of participating parties were limited because there was a threat of material prejudice. *Brown*, 218 F.3d at 429. But the court did not impose a blanket limitation. *Id.* The parties were still allowed to express assertions of innocence, general statements about the nature of an allegation or defense, and statements of matters of public record. *Id.* at 429-30. The court of appeals ruled that the order was valid because the scope was narrow

enough to eliminate the harmful speech while also allowing trial participants to still comment on the case. *Id*. at 430.

The district court in Sluff's case also created a narrowly tailored order that protects the proceedings while catering to her First Amendment rights. Sluff is only prohibited from "making any public statements, or directing others to make any public statements" that target Pastures or are about him. R. at 17. Sluff is still permitted to voice her opinions on the social media websites of her choice. The order does not prohibit her from asserting claims of innocence. R. at 17. The order does not mention a blanket ban on any discussion of the case. Rather, it prohibits the targeting of a witness, which is precisely what the court seeks to prevent.

This is notably different than the order in *Trump*, which was found to be overbroad because it restricted speech about individuals who gave previous commentary about the defendant. In *Trump*, the order prohibited speech that targeted several groups: Special Counsel, defense counsel, any of the court staff or personnel, and any foreseeable witness and their testimony. *Trump*, 88 F.4th at 1019. Several of the anticipated witnesses in *Trump* were high-ranking officials. *Id*. at 1020. In fact, some even wrote books about working

for the Trump administration. *Id.* Others gave interviews about Trump to news outlets. *Id.* Because many of the potential witnesses in the *Trump* case had equally expansive platforms, the court of appeals held that Trump had a right to publicly debate those individuals independent of their roles in the upcoming trial. *Id.* Sluff's order concerns one individual: Pastures. Unlike the witnesses in *Trump*, Pastures is not a high-ranking public official. He has neither written books about Sluff's character nor been interviewed by news outlets. Unlike Trump, Sluff does not have an interest in debating Pastures independent of his role as a witness. In fact, Pastures' lack of a platform makes him more vulnerable and defenseless against Sluff's allegations. The court of appeals in *Trump* ruled that the order must focus more "directly and narrowly on comments that speak to or are about those persons' potential participation in . . .this criminal proceeding." *Trump*, 88 F.4th at 1021. The Sluff order satisfies this standard. Sluff said Pastures would lie about her in court. R. at 2. Her other post discussed the alleged extortion and "Perjury Petey." R. at 4. Both of those posts indicate that Sluff's comments about Pastures speak to and are about his participation in her criminal proceeding.

4. The district court's order is not unconstitutionally vague because the order provides a person of ordinary intelligence fair notice of the prohibited conduct.

Sluff is likely to argue that the terms of the district court's order are vague. To satisfy constitutionality, an order restricting speech must set forth explicit standards. *S.B. v. S.S. (In re S.S.)*, 243 A.3d 90, 94 (Pa. 2020). The order should also be framed in a way that a person of ordinary intelligence can sufficiently understand and comply with the requirements. *Id*. The district court's order satisfies both guidelines.

A limitation on speech is unconstitutionally vague "if, applying the rules for interpreting legal texts, its meaning specifies no standard of conduct at all." *United States v. Bronstein*, 849 F.3d 1101, 1103 (D.C. Cir. 2017). In *Coates v. Cincinnati*, an ordinance was deemed unconstitutionally vague. The ordinance made it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . ." *Coates v. Cincinnati*, 402 U.S. 611, 612 (1971). The issue was with the word "annoying." *Id*. The Supreme Court acknowledged that what annoys some people may not annoy others. *Id*. at 614. Because "annoying" encompasses so many behaviors, the

Court ruled that it was not a true standard at all. *Id*. at 614. As a result, "men of common intelligence must necessarily guess at its meaning." *Id*. at 614 (citing *Connally v. General Construction Co*., 269 U.S. 385, 391 (1926)).

The orders in both the Sluff case and the *Trump* case contain the term "target." Trump's counsel argued that, like in *Coates*, "target," is incurably vague." Brief for Appellant at 50, *United States v. Trump* (No. 23–3190). The argument cited various definitions of "target."

> "The verb "target" means "to make a target of," whereas the noun "target" may mean "a mark to shoot at," "something or someone marked for attack," "a goal to be achieved," "an object of ridicule or criticism," or "something or someone to be affected by an action or development," among several other meanings."[2]

Because "target" has different meanings in different contexts, Trump asserted that it does not contain an explicit standard. *Id*. But the Supreme Court has also ruled that words contain "germs of uncertainty." *S.B. v. S.S. (In re S.S.)*, 243 A.3d at 111-12. As such, disputes may arise over the meaning of particular terms. But a court

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[2] *Target*, Merriam-Webster Online, https://www.merriamwebster.com /dictionary/target.

may decline ". . . to engage in a pedantic dissection of the word . . ." in question. *Id.* at 112. Further, the order cannot be invalidated if the terms are presented in a way "that the ordinary person exercising ordinary common sense can sufficiently understand and comply with . . ." *Id.* (citing *Broadrick v. Okla.*, 413 U.S. 601, 608 (1973)).

The district court in Sluff's case provided her with significant guidance. Considering the context of the order and Sluff's questionable behavior, it can be inferred that "target" does not refer to "a mark to shoot at." Brief for Appellant at 50, *United States v. Trump* (No. 23–3190). Rather, the focus is to prevent someone from becoming "an object of ridicule or criticism." *Id.* Even if Sluff is unable to discern what qualifies as "targeting," she has further instruction in the order. She is prevented from making any posts about Pastures at all. R. at 17. Because the order is narrowly tailored and satisfies the vagueness doctrine, Sluff's argument also fails in this regard.

II. The district court's order restraining Sluff's public comments about Prosecutor Doe does not violate the First Amendment because Sluff's comments pose a severe risk of contaminating the jury pool. No less restrictive alternatives can combat that risk. Further, the order is appropriately tailored.

Preservation of Error

As mentioned earlier, error was preserved when Sluff raised arguments that were also made in *United* States *v. Trump*. *See United States v. Trump*, 88 F.4th 990 (D.C. Cir. 2023).

Standard of Review

As discussed previously, the constitutionality of a gag order is reviewed de novo. The district court's findings will only be overturned for clear error. *Trump*, 88 F.4th at 996.

A. The order was proper because Sluff's posts create a serious risk of prejudice to the proceeding.

Sluff's desire for a fair trial does not grant her the right to a trial prejudiced in her favor. *Trump*, 88 F.4th at 1003. *See also United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir. 1969) ("The concept of a fair trial applies both to the prosecution and the defense."). Public comments from participants directly involved in a case may be limited to prevent prejudicing a jury. *In re State-Record Co., Inc.*, 917 F.2d 124, 128 (4th Cir. 1990). For example, John Doe is subject to

certain professional ethics and standards. Under rule 32:3.6 of the Iowa Code, Doe is prohibited from making a "statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Iowa R. of Prof'l Conduct 32:3.6. Sluff labeled Doe a liar. Doe cannot respond, a result of his professional obligations. If Doe were to rebut Sluff's allegations, his ethical integrity may be called into question for implying that she is dishonest. A prosecutor is not immune to public commentary. But Sluff's posts increase the likelihood of a prejudiced jury pool by casting doubt on Doe's honesty and ability to perform his job duties. She referred to Doe as a "rat," and as "corrupt." R. at 4-5. Her "statements were dipped in venom and were deliberately couched to poison the well from which the jury would be selected," which "goes beyond the pale, by any reasonable standard." *United States v. Cutler*, 58 F.3d 825,840 (2d Cir. 1995). To combat Sluff's repeated attacks on Doe, the trial court acted rationally to prevent a trial peppered with prejudice.

If a court fails to create boundaries for media coverage and extrajudicial comments, there can be a severe impact on proceedings.

In *Sheppard*, a defendant charged with the murder of his wife faced an "editorial artillery" and was eventually convicted. *Sheppard v. Maxwell*, 384 U.S. 333, 339 (1966). The Supreme Court noted the massive, pervasive, and prejudicial publicity prevented a fair trial. *Id.* at 335. Shortly after the murder occurred, the case was on the front-page news. The headline read, ""Why Isn't Sam Sheppard in Jail?" *Id.* at 341. Another editorial was titled "Why Don't Police Quiz Top Suspect?" *Id.* After Sheppard's arrest, coverage continued to intensify and came to a head during the trial. The judge allowed 20 newspaper reporters to pack into a courtroom that was only 26 by 48 feet. *Id.* at 343. Photographers were allowed to take photos of the defendant and jurors during recess. *Id.* A news station was permitted to set up broadcasting equipment on the third floor of the courthouse, right next to the jury room. *Id.* The Supreme Court ruled that, by giving media outlets unlimited access to the trial, the judge failed to protect Sheppard from the publicity which "saturated the community." *Id.* at 363. The Court in *Sheppard* acknowledged that, in the quest for attention-grabbing headlines, much of the information published in the press was "inaccurate, leading to groundless rumors and confusion." *Sheppard*, at 359.

Doe faces a stronger threat—a local social media star who produces viral content and who is directly involved in the case at issue. News sources and means of communication have changed drastically since 1966, the year of the *Sheppard* trial. In fact, a 2021 Pew Research Center study revealed that 53% of Americans rely on social media for news.[3] In *Sheppard*, the Supreme Court was concerned that the judge allowed twenty reporters in the courtroom. If Sluff is allowed to continue posting, all two million of her followers will be in the courtroom, some in person and others digitally. Sluff has far more reach, influence, and impact than the reporters did in *Sheppard*. The prejudicial rumors from Sluff along with her constant posts embody the same chaotic behavior that was on display in the *Sheppard* trial. The only way the district court could ensure a trial free from an editorial artillery was to limit the speech of the main antagonist.

When trial participants use the media to benefit their position, an order limiting extrajudicial speech is proper. In *U.S. v. Brown*, the

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[3] Elisa Shearer, *More than eight-in-ten Americans get news from Digital Devices Pew Research Center* (2021), https://www.pewresearch.org/short-reads/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices

Fifth Circuit dealt with equally outspoken defendants. 218 F.3d 415 (5th Cir. 2000). In *Brown,* an elected Insurance Commissioner was facing charges related to a sham insurance settlement. *Id.* at 418. After the indictment was issued, Brown participated in a news conference. *Id.* In it, he declared his innocence and stated that he was the victim of a "political drive-by shooting" at the hands of "an out-of-control prosecutor." *Id.* Since Brown was seeking re-election as the Insurance Commissioner, the court temporarily lifted the gag order to avoid interfering with the campaign. *Id.* at 419. But several defendants began releasing telephone conversations and other material to the media. *Id.* The gag order was reinstated. Brown argued that it should only apply to counsel, not to defendants or witnesses. *Id.* at 420. The Fifth Circuit disagreed, citing a "reasonably found substantial likelihood" that inflammatory comments from both the lawyers and the parties could impact the jury pool. *Id.* at 423. The "trial by newspaper" can have devastating effects on a fair trial. The district court recognized that the parties in *Brown* "already demonstrated a desire to manipulate media coverage to gain favorable attention" and would attempt to use "the media to influence

the potential jury pool and create a prejudicial media atmosphere." *Id*. at 429.

The same applies to Sluff. In fact, Brown and Sluff used similar language to describe the prosecution. Brown said his case was a political drive-by. *Id*. at 418. Sluff referred to her case as a "political hit job." R. at 5. Like the parties in *Brown*, Sluff has also displayed a willingness to manipulate social media in her favor. Between September 12 and October 31, Sluff published more than 2,000 posts that mentioned Pastures, Doe, or both. R. at 4. That means, on average, Sluff made 40 posts every day– to an audience of over half a million people– about the County Attorney and the witness. Within the first hour of Sluff publishing a post, it had 95 retweets, 256 quote tweets, and over 2,800 likes. R. at 5. Even more concerning is that engagement numbers captured in that screenshot do not reflect the actual reach that the post achieved. R. at 4. The district court understood its duty to protect the judicial process from outside interferences. As noted in *Sheppard*, "[n]either prosecutors . . . the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." *Sheppard*, 384 U.S. at 363. The accusatory content of

Sluff's posts, partnered with her extensive social media reach, is the perfect concoction to influence jurors—whether through conscious bias or subconscious bias through repetitive smears.

B. Because Sluff continues to post inflammatory content, no less restrictive alternative would be effective.

No participant in the trial process is entitled to make public statements that create this kind of risk of unfair prejudice, and a court has the authority to act to prevent that prejudice.

When a court finds that less restrictive alternatives are inadequate, the only option is to mitigate harm by restricting speech. In *Pedini v. Bowles*, a member of the Dallas Cowboys football team was charged with possession of cocaine. *Pedini*, 940 F. Supp. 1020, 1023 (N.D. Tex. 1996). Pedini was a witness in the case. Because of the high-profile nature of one of the defendants, an order was issued to prevent pretrial publicity, ensuring the court's ability to impanel an impartial jury. *Id.* at 1024. Several days after the order, Pedini appeared on a national television program for an interview. He was later held in contempt and fined. *Id.* at 1025. Pedini argued that less restrictive alternatives were not considered. The two options were a change of venue and postponement of the trial. *Id.* The court rejected

both suggestions. *Id*. The court explained that restrictions on extrajudicial comments were necessary in order to "ensure the availability of the option of a change of venue." *Id*. The second option, postponement of the trial, would also be ineffective. The judge found that "there is no indication that delaying the trial . . . would lessen the amount of pretrial publicity in these cases." *Id*.

Like the witness in *Pedini*, Sluff continues to make public comments about her case after a judge told her to stop. As mentioned previously, Sluff was given the opportunity to practice self-restraint after the hearing on September 10. But she resumed her flurry of posts about Doe and Pastures shortly thereafter. R. at 4. Sluff now argues that less restrictive alternatives are applicable to her case. That is incorrect.

5. Change of venue is not a valid alternative because Sluff has a large following and Doe would still be the prosecutor even if the case was tried elsewhere.

When a defendant has a large social media platform, moving the trial to a new location is ineffective. This issue is most visible in the *Trump* case. In *Trump*, the court of appeals agreed with the lower court's ruling that changing trial locations would not cure the problem of material prejudice. *Trump*, 88 F.4th at 1017. Trump has

approximately 87.73 million followers on his X account.[4] No matter the location of the trial, the litigation teams would be subject to the same interference. *Id*. at 1018. Sluff's case is no different. Although her follower count has not reached the level of the former President, she has amassed a substantial following as the social media director for Teamsters Local 238. R. at 1. Because Sluff is based in Iowa, it is likely that a large portion of her 500,000 X followers are also Iowans. R. at 1. The bias created and promoted by Sluff would follow the trial to another location. Further, under Iowa law, the prosecuting attorney in the original county is responsible for prosecuting in the receiving county. Iowa R. Crim. P. 2.11(11). Doe would still be the prosecutor even if a new venue is approved. Sluff's social reach and volume of posts effectively silence any argument for a change of venue.

[4] Number of followers of Donald Trump on select social media platforms as of January 2023, https://www.statista.com/statistics/1336497/donald-trump-number-of-followers-selected-social-platforms/

6. Extensive questioning during voir dire would not redress any taint from Sluff's posts.

Voir dire is usually considered an effective safeguard against a biased jury. But in cases of extensive pretrial publicity, its effects are limited. In *Levine v. United States Dist. Court for Cent. Dist.*, Richard Miller was arrested and charged with espionage. *Levine v. United States Dist. Court for Cent. Dist.*, 764 F.2d 590, 591 (9th Cir. 1985). A former special agent with the FBI, Miller allegedly passed classified documents to individuals outside of the organization. *Id.* The district court soon became aware of the defense attorneys' interviews with media outlets. *Id.* at 592. The attorneys continued to participate in interviews after the court warned them to stop. *Id.* The court eventually issued an order that prevented "all attorneys . . . parties and all their representatives" from making any statements to members of the media. *Id.* at 593. Given the nature of the crime alleged, there was extensive coverage. The district court considered and rejected all available alternatives to the gag order. *Id.* at 599. Miller and his attorneys challenged the court's rejections. *Id.* They argued that voir dire would eliminate any bias that resulted from pretrial publicity. *Id.* at 600. The court of appeals disagreed. In its opinion, the court explained that voir dire was "powerless to

neutralize such prejudicial publicity." *Id*. at 600. Further, voir dire could not effectively "alleviate the harm to the integrity of the judicial process caused by the extrajudicial statements of trial participants." *Id*.

Given the pervasive nature of Sluff's commentary and her reach on social media platforms, voir dire cannot be relied on. On average, she posts 40 times a day to her X audience of over half a million people. As the Supreme Court noted in *Gentile*, even "extensive voir dire may not be able to filter out all of the effects of pretrial publicity . . ." *Gentile*, 501 U.S. at 1075. Sluff is likely to argue that voir dire can eliminate the chances of a biased jury because ". . . in cases of extensive publicity . . . counsel should be accorded more latitude in personally asking or tendering searching questions that might root out indications of bias." *Neb. Press Ass'n v. Stuart*, 427 U.S. at 602. But there is a unique challenge facing Doe. He would be tasked with detecting bias directed toward himself. Because Sluff has perpetuated the belief that Doe is dishonest, jurors may not feel like he is entitled to their honest opinions. R. at 13. Voir dire is a "short window of time for attorneys and the court to determine whether a juror will be unbiased and impartial." *State v. Mootz*, 808 N.W.2d 207, 225 (Iowa

2012). Sluff's public comments about Doe may inspire a potential juror to be dishonest during voir dire because of adopted resentment R. at 13.

7. Postponing the trial would only be an incentive for Sluff to continue spreading false narratives.

It has been well established that Sluff will take advantage of her social media reach and disregard a judge's advice so that she may continue to post about Doe's involvement in her criminal trial. Sluff has suggested delaying the trial until after the October 2024 election, so that the trial will not occur while she is actively campaigning against the prosecutor. R. at 14. But the order does not prohibit Sluff from voicing her political opposition to Doe. R. at 17. Postponing Sluff's trial would only create an incentive for her. In fact, it would grant Sluff more time to grow her audience while promoting her animosity toward Doe.

The argument for a delayed trial is derived from *Nebraska Press*. In *Nebraska Press*, the Supreme Court found that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 553 (1976).

But Sluff has not given any reason for the court to believe that the continuation of her trial will result in less inflammatory commentary. She has proven the opposite. After Sluff was instructed by the district court to exercise caution when posting, her posts intensified. R. at 9. Postponing the trial in Sluff's case would amplify the harm that the court sought to mitigate. Further, it would not address the root cause of the district court's concern. *Brown*, 218 F.3d at 431.

C. The district court's order is narrowly tailored because Sluff is not restricted from criticizing Doe's platform or policies. The order only prohibits Sluff from making public statements about Doe in combination with her criminal case.

For the order to be constitutional, it must be "narrowly tailored to maximize the amount of protected speech allowed while still averting the 'substantive evil of unfair administration of justice [.]'" *Trump*, 88 F.4th at 1008, (quoting *Landmark Commc'ns, Inc. v. Virginia,* 435 U.S. 829, 844 (1979)). In *Trump*, the court of appeals ruled that the district court's original order was not narrowly tailored. The order prohibited parties from "making or directing others to make any public statements that target—that are directed to or aimed at—prosecutors or court staff." *Trump*, 88 F.4th at 1025. The district

court went too far. Because prosecutors are "vested with immense authority," the public has a significant interest in making sure that prosecutors exercise that power responsibly. *Id*. An order preventing all commentary on their performance undermines the protections of the First Amendment.

It is true that the First Amendment has its "fullest and most urgent application" to speech during a campaign for political office. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). But the order in Sluff paid careful attention to the interests at play: her desire to run against John Doe for Dallas County Attorney while ensuring a trial free from prejudice. Unlike the *Trump* order, Sluff is not barred from making any public comments about Doe. R. at 17. Instead, she is barred from making public comments that discuss Doe in connection with her criminal case. R. at 17. She is not prevented from discussing or criticizing his platform or polices, especially considering that she is now his political opponent. R. at 17. The district court's order was constitutionally narrow because it protects the trial from material prejudice while considering the freedoms guaranteed by the First Amendment.

CONCLUSION

The State respectfully requests that this Court reject Sluff's challenges and affirm the district court's order.

REQUEST FOR ORAL SUBMISSION

The State respectfully requests to be heard at oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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