# GAGGED!

The DC Circuit has reimposed most of the gag that Judge Chutkan imposed on Trump.

> Like any other criminal defendant, Mr. Trump has a constitutional right to speak. And his millions of supporters, as well as his millions of detractors, have a right to hear what he has to say. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756–757 (1976). Also like any other criminal defendant, Mr. Trump does not have an unlimited right to speak. "Although litigants do not surrender their First Amendment rights at the courthouse door, those rights may be subordinated to other interests that arise in [the trial] setting." Seattle Times, 467 U.S. at 32 n.18 (formatting modified). In particular, the public has a compelling interest in ensuring that the criminal proceeding against Mr. Trump is not obstructed, hindered, or tainted, but is fairly conducted and resolved according to the judgment of an impartial jury based on only the evidence introduced in the courtroom. See Gentile, 501 U.S. at 1075; Wade, 336 U.S. at 689.

While Trump is free to malign Jack Smith, he's not free to malign Smith's spouse, other prosecutors, Judge Chutkan's staff or — most importantly — witnesses.

It's about dinner here — I'll come back and pull some of the opinion in a bit.

Update: Millett describes Trump's attacks on social media, "laundering communications."

> There is no question that Mr. Trump could not have said directly to Mark Meadows, former Vice President Pence, or former Georgia Lieutenant Governor

> Duncan any of the statements he posted on social media about their potential discussions with the Special Counsel or grand-jury testimony, and the consequences that would follow. Yet the district court's prohibition on Mr. Trump's direct communications with known witnesses would mean little if he can evade it by making the same statements to a crowd, knowing or expecting that a witness will get the message. Cf. Sheppard, 384 U.S. at 359 (restrictions on witnesses observing other witnesses' testimony mean nothing if "the full verbatim testimony [is] available to them in the press"); Estes, 381 U.S. at 547.
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> Mr. Trump's counsel conceded at oral argument that the former President speaking about the case "with a megaphone, knowing that [a] witness is in the audience" would likely present the "same scenario" as Mr. Trump's calling that witness directly, in violation of his conditions of release. Oral Arg. Tr. 33:12–17. So too if the defendant posts a message on "social media knowing that [witness] is a social media follower of his," id. 33:20–23, or that the message will otherwise likely reach the witness. In each of these scenarios, the defendant's speech about witness testimony or cooperation imperils the availability, content, and integrity of witness testimony.
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> Accordingly, the district court had the authority to prevent Mr. Trump from laundering communications concerning witnesses and addressing their potential trial participation through social media postings or other public comments.

The opinion distinguishes a heckler's veto from Trump's incitement.

> Second, Mr. Trump objects that holding him responsible for his listeners' responses to his speech unconstitutionally imposes a "classic heckler's veto," "regardless of how predictable * * * [Mr. Trump's supporters'] unruly reactions might be." Trump Br. 37–38; see Trump Br. 36–39. Not so.
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> To start, that argument ignores the significant risk of harm caused by Mr. Trump's own messaging to known or potential witnesses about their participation in the criminal justice process and his menacing comments about trial participants and staff.
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> The claim also misunderstands the heckler's veto doctrine. That doctrine prohibits restraining speech on the grounds that it "might offend a hostile mob" hearing the message, Forsyth County v. Nationalist Movement, 505 U.S. 123, 134–135 (1992) (emphasis added), or because its audience might express "hostility to" the message, Cox, 379 U.S. at 551. The harm the district court identified here was not that some members of the public who oppose Mr. Trump's message might react violently and try to shut down his speech. Cf. National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 43–44 (1977). The concern was instead "how predictable" it has become, Trump Br. 38, that some (but certainly not all, or even many) of Mr. Trump's followers will act minaciously in response to his words.
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> Of course, the First Amendment generally does not allow speech to be restricted because of some enthusiastic audience members' reactions. Outside of a judicial proceeding, ordinarily only speech that rises to the level of

> incitement of the audience can be banned. See Brandenburg v. Ohio, 395 U.S. 444, 448–449 (1969) (striking down law that failed to distinguish "mere advocacy" from "incitement to imminent lawless action").
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> But within a judicial proceeding, a trial court's duty to protect the functioning of the criminal trial process is not cabined by the incitement doctrine. Sheppard holds that courts may, and sometimes must, limit the speech of trial participants to prevent the prejudice to the trial process caused by third parties. Sheppard involved a criminal trial beset by suffocating press coverage and publicity. 384 U.S. at 358. The press regularly reported on evidence leaked to them by both sides, even though such evidence was never offered into evidence in court. Id. at 360–361.
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> The Supreme Court held that, as a means of addressing and averting harm to the criminal justice process, the trial court should have "proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters[.]" Id. at 361. Had the trial court done so, "the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom—not pieced together from extrajudicial statements." Id. at 362. In other words, the Supreme Court explained that a protective order restricting trial participants' speech should have been entered in Sheppard not only because the parties' expression was itself obstructive, but even more so because outsiders' reactions and responses to that speech also threatened the integrity of the trial process. At no point in Sheppard did the Supreme Court

> even hint that evidence demonstrating that the parties were already inciting interfering press coverage would have been needed before the court could act.
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> So too here. Many of former President Trump's public statements attacking witnesses, trial participants, and court staff pose a danger to the integrity of these criminal proceedings. That danger is magnified by the predictable torrent of threats of retribution and violence that the district court found follows when Mr. Trump speaks out forcefully against individuals in connection with this case and the 2020 election aftermath on which the indictment focuses. The district court appropriately found that those threats and harassment undermine the integrity of this criminal proceeding by communicating directly or indirectly with witnesses and potential witnesses about their testimony, evidence, and cooperation in the justice process. They also impede the administration of justice by exposing counsel and members of the court's and counsel's staffs to fear and intimidating pressure. The First Amendment does not afford trial participants, including defendants, free rein to use their knowledge or position within the trial as a tool for encumbering the judicial process.

I had to look up, "minaciously," which is not at all "quixotic."