Supreme Court of the State of New York
Appellate Division – First Department

Case Nos.:
2023-04925
2024-01134
2024-01135

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

- against -

DONALD J. TRUMP, DONALD TRUMP, JR., ERIC TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, 401 NORTH WABASH VENTURE LLC, TRUMP OLD POST OFFICE LLC, 40 WALL STREET LLC and SEVEN SPRINGS LLC,

Defendants-Appellants.

(See inside cover for continuation of caption and appearances)

NOTICE OF MOTION OF CITIZENS UNITED, CITIZENS UNITED FOUNDATION, THE PRESIDENTIAL COALITION, LLC, AMERICA'S FUTURE, GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, GUN OWNERS OF CALIFORNIA, FREE SPEECH COALITION, FREE SPEECH DEFENSE AND EDUCATION FUND, U.S. CONSTITUTIONAL RIGHTS LEGAL DEFENSE FUND AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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August 2, 2024

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PLEASE TAKE NOTICE that upon the annexed Affirmation of Steven J. Harfenist, dated August 2, 2024, and all exhibits attached thereto, and upon all prior proceedings had herein, Citizens United, Citizens United Foundation, The Presidential Coalition, LLC, America's Future, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Free Speech Coalition, Free Speech Defense and Education Fund, U.S. Constitutional Rights Legal Defense Fund and Conservative Legal Defense and Education Fund, will move this Court, at the Supreme Court, Appellate Division, First Department, 27 Madison Avenue, New York, New York 10010, on August 12, 2024 at 10:00 a.m. or as soon thereafter as counsel may be heard, for an order, pursuant to 22 N.Y.C.R.R. §§ 1250.4(f) and 600.4(b), permitting *amici* to serve and file a brief *amicus curiae* in support of Defendants-Appellants former President Donald J. Trump, *et al*., in the above-captioned appeal, and granting such other and further relief as the Court deems just and proper.

Dated: Lake Success, New York
August 2, 2024

Respectfully submitted,
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AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

STEVEN J. HARFENIST, an attorney admitted to practice before the courts of New York, New Jersey, and Georgia, affirms as follows:

1. I am a Partner with Harfenist Kraut & Perlstein LLP, and I submit this affirmation in support of proposed *Amici Curiae*'s motion for leave to file Brief *Amici Curiae* in the above-captioned appeal.

2. *Amici Curiae* do not request permission to participate in oral argument.

3. A copy of the proposed Brief is attached in accordance with the Court's rules.

4. This Court may grant a nonparty leave to file an *amicus curiae* brief if the brief would be of assistance to the Court, so long as the brief does not duplicate arguments already made. *See* 22 N.Y.C.R.R. § 1250.4(f).

5. This appeal involves questions of great public importance namely, the entry of a civil judgment imposed upon former President Donald J. Trump, unauthorized by New York statute and violative of the U.S. Constitution's First Amendment, guarantee of Due Process and the prohibition on excessive fines.

6. Citizens United, Citizens United Foundation, America's Future, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Free Speech Coalition, Free Speech Defense and Education Fund, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund

are nonprofit organizations, exempt from federal taxation under Sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, which work to defend constitutional rights and protect liberties. The Presidential Coalition, LLC is a political committee.

7. *Amici*'s proposed brief provides arguments that are distinct from those presented by the Appellants. *Amici* focus on constitutional and statutory questions that complement Appellants' opening brief. Specifically, A*mici* amplify the arguments related to the First, Eighth and Fourteenth Amendments to the U.S. Constitution, and also analyze the availability of the equitable remedy of disgorgement in the context of this case.

8. The proposed Brief *Amici Curiae* will not be prejudicial to any of the parties as it is being timely filed, within fourteen days after the filing of the Appellants' Brief. Furthermore, it complies with the word limit of this Court's rules for *amicus* briefs.

9. No party or its counsel contributed to this brief or otherwise participated in its preparation.

WHEREFORE, for the foregoing reasons, *Amici Curiae* respectfully request that the Court grant their motion in all respects and permit the filing of their Brief *Amicus Curiae* in this appeal.

Dated: Lake Success, New York
August 2, 2024

Respectfully submitted,
HARFENIST KRAUT & PERLSTEIN, LLP

By: _____

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INTEREST OF THE *AMICI*

The interest of the *amici* is set out in the accompanying Motion to file Brief *Amici Curiae*.

STATEMENT OF THE CASE

In September 2022, New York Attorney General Letitia James ("AG") filed a seven-count civil suit against former President Donald Trump, several family members, business associates, and companies in which Mr. Trump had a controlling interest. The suit alleged seven counts of violating New York Executive Law §63(12) by submitting false financial statements to banks and insurance companies to obtain better rates on loans and insurance coverage.

Count One was a "standalone" count for violating §63(12), which the trial court found required only a finding of "persistent and repeated fraud." Counts Two through Seven asserted specific violations of falsifying business records, issuing false financial statements, insurance fraud, and conspiracy to commit the three violations, which requires proof of specific intent and materiality. *See People v. Trump*, 2023 N.Y. Misc. LEXIS 5705, at 43-44 (N.Y. Sup. Ct. 2023) ("*Trump I*").

In September 2023, Justice Arthur Engoron granted summary judgment to AG on Count I, sending it to trial to determine the penalty, together with the remaining six claims to determine both liability and the penalty. *Trump I* at *43-45, 72-77. In February 2024, the trial court ruled that where "persistent fraud or illegality" exists,

New York courts can impose an award of fines payable to the AG under "equitable" principles, even though such fines are not expressly authorized by statute. *See People v. Trump*, 2024 N.Y. Misc. LEXIS 711, at 8 (N.Y. Sup. Ct. 2024) ("*Trump II*").

On February 16, 2024, the trial court found Mr. Trump liable on five of the six remaining counts (*Trump II* at 177-79, 183-86, 205) and two Trump organization officials liable on the final count of committing insurance fraud (*id.* at 185, 205), imposing just shy of a $355 million civil judgment against Trump and his associated businesses.

The Judgment consisted of three primary amounts. *Id.* at 205-07. First was $168,040,168 for the amount the Trump organizations saved in interest payments on loans for four properties allegedly obtained at artificially-low interest rates through use of false financial information. *Id.* at 189.

Second was $126,828,600 as profit for the sale of the "Old Post Office" property on which the Trump organizations allegedly obtained loans via false financial statements. *Id.* at 191. Third was $60 million in profits from the sale of a license agreement for the Ferry Point property, an agreement allegedly obtained by the use of false financial statements. *Id.* In addition, the court-imposed prejudgment interest, with the total award and interest reportedly in the range of $435 million.

The court also barred Trump from serving as an officer or director of a

corporation in New York for three years and barred his associated businesses from applying for loans in New York for three years. *Id.* at 207.

STATEMENT

While the *amici* have filed hundreds of *amicus* briefs in federal and state courts across the country, this is a case unlike any other.

A large and sophisticated New York business negotiated "deals" with much larger and highly sophisticated banks and insurance companies which were represented by experienced counsel, reaching agreements the terms of which have been fully and timely fulfilled. Long after the transactions closed, the State of New York intruded into these private business deals, over the objection of all parties. Significantly, no victim came forward to start this case. Instead, the State chose to commence this action on their own. These were private agreements between private parties - none of whom thought that any fraud was being committed.

New York appears to treat these large financial institutions with which Trump did business as though they were innocent consumers being preyed upon. New York ignores the fact that large financial institutions enter into such agreements only after performing their own extensive "due diligence." All financial representations by Trump were accompanied by disclaimers — even though the disclaimers were really not necessary, for they said what all parties already knew — caveat emptor.

Nor did the evidence show the most crucial element of a fraud claim -

reasonable reliance on Trump's representations. As extraordinarily sophisticated parties, their reliance on the Trump's representations never happened.

It is significant to note that no harm was suffered by the public for the State to vindicate. Government has one basic tool — force — which it used here to invent a problem that did not exist, so it could impose a mammoth penalty, the sole beneficiary of which is the State of New York.

The penalty and interest assessed in this case — at least $435 million — is so large that available adjectives fail to fully demonstrate its size: colossal? gargantuan? mammoth? titanic? One way to conceptualize that amount is to compare it to the entire budget of the AG for the entire state of New York for the entire year — which is $349.8 million. That amount covers all of the Law Department's operations, which include: prosecuting or defending actions and proceedings for or against the State and its departments; criminal cases; organized crime; polluters; antitrust; fraud; consumer complaints; and Medicaid fraud.[1] It covers payroll for the Department's staff of over 1,700 persons and over 700 assistant attorneys general.[2] The excess $115 million over the Law Department's budget is almost six times the $23.3 million budget for the Office of the Governor.[3]

[1] *See* www.budget.ny.gov/pubs/archive/fy21/exec/agencies/appropdata/lawdepartmentof.html.
[2] *See* www.ag.ny.gov/about/about-office
[3] *See* www.budget.ny.gov/pubs/archive/fy24/ex/agencies/appropdata/executivechamber.html

In fulfilling her campaign promise to "get Trump,"[4] AG has provided the state what could be viewed as an obscene windfall from her decision to litigate this baseless case.

In addition, the political motivation behind this case cannot be ignored. This Court has responsibility to restore order to the conduct of business in the State of New York. If it allows New York State to engage in lawfare against certain politically disfavored individuals and businesses, it should expect again to be rebuked by a higher court, just as happened four months ago in *NRA v. Vullo*.

Regardless of the motivation, consider the effect: "I would never invest in New York now and I'm not the only person saying that," said "Shark Tank" star Kevin O'Leary.[5] "It has nothing to do with Trump, forget about Trump, this is not a Trump situation, this is a New York problem now the whole world is looking at this, saying what are you doing to yourselves?" *Id.*

For President Trump, the process has already inflicted an enormous punishment. It is past time to end these proceedings before the damage done to the State of New York far exceeds the damage done to Defendants.

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[4] *See* D. Murdock, "Letitia James, Judge Engoron Wanted to Get Trump, Justice Be Damned," *Daily Signal* (Feb. 27, 2024)

[5] T. Hains, "O'Leary: 'Shocked' At 'Arbitrary' Trump Fraud Decision, 'I Would Never Invest In New York Now,'" *Real Clear Politics* (Feb. 19, 2024)

ARGUMENT

POINT I

EXECUTIVE LAW §63(12) DOES NOT PROVIDE THE ATTORNEY GENERAL THE REMEDY OF DISGORGMENT WHERE THE CITIZENS OF NEW YORK SUFFERED NO HARM

Despite Supreme Court's determination, and that of this Court in *People v. Ernst & Young*, Executive Law §63(12) expressly authorizes two types of financial penalties: "restitution and damages." (Emphasis added.) The statute additionally provides that the court may provide injunctive relief, may cancel any certificate to conduct business, and "may award the relief applied for or so much thereof as may deem proper." *Id*. It does not authorize disgorgement.

As Appellants make clear, "the text of § 63(12) provides for other forms of equitable relief without specifying disgorgement. The only cases involving § 63(12) awarding disgorgement all contained claims under the Martin Act or other statutes that authorize broader equitable remedies than § 63(12)." Appellants' Br. at 56 n.12.

The AG's complaint requested the injunctive relief the statute authorizes, but sought neither restitution nor damages. Rather, it sought a type of financial penalty not expressly authorized by the statute: "disgorgement of all financial benefits obtained by each Defendant from the fraudulent scheme, including all financial benefits from lenders and insurers through repeated and persistent fraudulent practices ... plus prejudgment interest." Complaint at 214. The trial court ordered

the defendants to disgorge — and pay over to the state of New York — over $435 million. *See Trump II* at 206. But disgorgement in this case is inappropriate.

Despite the absence of statutory authority for disgorgement, the trial court asserted that §63(12) authorizes disgorgement as an equitable remedy, believing it was implied by the statute and supported by two cases: *People v. Ernst & Young, LLP*, 114 AD3d 569 (1st Dept 2014), and *New York v. Amazon.com, Inc.*, 550 F. Supp. 3d 122 (S.D.N.Y. 2021). *See Trump II* at 187.

According to Justice Engoron, a fragment of the last sentence of the statute contemplates disgorgement when it mentions "all monies recovered or obtained under this subdivision." *Id*. But the statute does not end there. Rather, it continues "by a state agency or state official or employee acting in their official capacity shall be subject to subdivision eleven of section four of the state finance law." When read in context, the cited language addresses the disposition of funds received and in no way provides New York with authority to obtain disgorgement.

Moreover, unlike other statutes that authorize the Attorney General to commence civil action in the name of the State, §63(12) does not have a catchall remedial provision authorizing the court to provide such other relief as may be just and proper. Compare, *People ex rel. Schneiderman v. Greenberg*, 27 N.Y.3d 490, 34 N.Y.S.3d 402, 54 N.E.3d 74 (2016) (authorizing disgorgement based upon catchall remedial provision)

Justice Engoron found support for disgorgement in *Ernst & Young*, where the court stated: "[W]here, as here, there is a claim based on fraudulent activity, disgorgement may be available as an equitable remedy, notwithstanding the absence of loss to individuals or independent claims for restitution." *Trump II* at 186-87

However, the circumstances under which disgorgement "may" be available in *Ernst & Young* do not apply here.

Ernst & Young involved injury suffered by a large segment of the New York public resulting from the financial collapse of Lehman Brothers. This Court's short opinion denying a motion to dismiss, allowed the case to proceed even though the Attorney General did not initially "allege direct injury to the public or consumers," stating it would be "premature to categorically preclude" the remedy on a motion to dismiss. *Id*. at 570.

Instead, "disgorgement" was being preserved should the Attorney General be precluded from seeking restitution and damages due to a private settlement. *Id*. Here, the issue arises, not on a motion to dismiss but after trial and the entry of judgment. Unlike *Ernst & Young*, there was no broad public harm. The companies which contracted with the Trump companies do not believe they were harmed at all. Unlike *Ernst & Young*, the companies are not barred from seeking restitution and damages, but rather, they are seeking none because none exists.

Ernst & Young is built on a 2008 Court of Appeals decision recognizing that

"the Attorney General might be able to obtain disgorgement — an equitable remedy distinct from restitution — of profits that respondents derived from all New York consumers." *Matter of People of the State of N.Y., by Eliot Spitzer, as Attorney Gen. v. Applied Card Sys. Inc.*, 11 N.Y.3d 105, 125, 863 N.Y.S.2d 615, 628, 894 N.E.2d 1, 14 (2008). What is apparent in *Applied Card Systems, Inc.* is that the Attorney General was acting on behalf of the citizens of New York, not a handful of banks and insurance companies who never claimed to be damaged.

This case could not be more different than *Applied Card Systems, Inc.* where many "real" victims had already received full restitution under a separate class action settlement, allowing for disgorgement to "profits that respondents derived from all New York consumers...." *Id*. In the present case, the putative victims of the alleged fraud were private parties — not the New York public — and even those private parties dispute that they were harmed at all.

The trial court also relied on *New York v. Amazon.com* — a 2021 decision on a motion to remand after Amazon.com sought removal to federal court. *Amazon.com* did not involve fraud, but involved that company's violation of state health laws, causing injury to its workers and claims of retaliatory job actions against complaining employees. The precise nature of those "profits" that could be disgorged was not specified, but presumably would include the amount that Amazon.com had been mandated by law to expend to comply with health

requirements.

Here, there is no public component to AG's claims. No law mandated Defendants to expend any funds. The public health was not involved. The AG did not even purport to be acting on behalf of any of the parties with whom the Trump companies contracted. Nor was there a large group of injured citizens. Ironically, the parties the People claim to have been protecting denied injury at all. Nor was there spill-over harm suffered by the public.

Finally, the trial court's use of the word "profits" to justify disgorgement is disingenuous when the Court admitted that the Trump companies paid in full, and on time, the amounts which the sophisticated banks and insurance companies negotiated. *Trump II* at 187. The trial court's estimate of so-called "profits" is entirely speculative and cannot properly provide the basis for any award.

As opposed to the authorities relied upon by Supreme Court, one seems the most analogous to this one was ignored by the trial court. In *People v. Direct Revenue, LLC*, 19 Misc. 3d 1124, 862 N.Y.S.2d 816 (N.Y. Sup. Ct. 2008), the New York County Supreme Court flatly rejected a claim for disgorgement of profits received from private parties:

> First, insofar as disgorgement is based upon unjust enrichment, [the Attorney General does] not allege that respondents received anything of value from petitioner or consumers. Second, while the Executive Law ... permit[s] monetary relief in the form of restitution or damages to consumers, the statutes do [not] authorize the general disgorgement of profits received from sources other

> than the public. And even where restitution may be awarded to consumers, it may only be granted in an amount related to the actual damages caused by the misconduct. [The Attorney General] is thus strictly limited to recovery as specifically authorized by statute. *Id.* (cleaned up).

The *Direct Revenue* court went on to reject the disgorgement remedy applied by Supreme Court in this case concluding it would constitute punitive damages. But it has long been established that §63(12) does not authorize the Attorney General to recover punitive damages. *See State v. Solil Management Corp.*, 128 Misc. 2d 767, 773 (N.Y. Sup. Ct. 1985), aff'd, 114 A.D.2d 1057 (1st Dept. 1985) ("Petitioner, however, is not entitled to punitive damages or treble damages, or both, from respondent. Executive Law §63(12) does not provide for either of these extraordinary remedies...."). *See also* Appellants' Br. at 56 n.12.

No matter how the trial court's gargantuan award is viewed, it was not expressly authorized by statute since disgorgement is not a proper remedy under the statute where no harm to the public is alleged. In a case such as this, the large and sophisticated banks and insurance companies can take care of themselves. The financial information provided to them included numerous disclaimers. *See* Appellants' Br. at 26-27. But, most importantly, the alleged "victims" deny suffering any loss.

As Supreme Court used a damages recovery not authorized by the statute it simply cannot stand and must be vacated.

POINT II

THE TRIAL COURT HAD NO AUTHORITY TO SANCTION "FALSITY ALONE" UNDER THE FIRST AMENDMENT

Appellants correctly assert that the trial court's finding of statutory (not common law) fraud — is a finding based on "falsity alone." But this rubric violates the First Amendment. *See* Appellants' Br. at 53-54.

The trial court fully understood that common-law fraud has always required a showing of five distinct elements (a material statement; falsity; knowledge of the falsity; justifiable reliance; and damages) by clear and convincing evidence. *Trump II* at 3. However, it concluded these well-established standards must be too high to meet, as "fraudsters were having a field day." *Id*. As a result, the court interpreted §63(12) as authorizing its assessment of nearly a half-billion dollars in penalties based only on a finding of the presence of one of the five elements of fraud — repeated false statements in business. The trial court did not so much as pause to consider whether such an interpretation of that statute would be consistent with the First Amendment.

Falsity alone is not a sufficient predicate for imposing criminal or civil penalties. It was recently deemed not to provide a sufficient predicate to sanction lying of the most reprehensible type — claiming military honors never earned. To be sure, *United States v. Alvarez*, 567 U.S. 709, 722-723 (2012), addressed the lawfulness of imposing a criminal sanction, but the First Amendment principle

articulated there applies equally well here. This is particularly true where the civil sanction is crippling as the imprisonment sanctions imposed by the "Stolen Valor Act." The High Court appeared shocked at the astonishing scope of that Act: "[t]he statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings...." As interpreted by the trial court, §63(12) is just as limitless.

Although both Mr. Alvarez and Mr. Trump were alleged to have made false statements to achieve some type of personal benefit, both cases impose punishment based only on the presence of falsity. The *Alvarez* Court made clear that common law fraud was outside the scope of the First Amendment, but it also made clear that the Constitution requires more than falsity for such liability. The *Alvarez* Court stated that: "[t]he mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Id*. at 723.

When the government has demonstrated that it has political animosity against the defendant, as here, there is yet another First Amendment principle involved. "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

As simply applying a falsity standard violates the First Amendment, this Court must reject Supreme Court's interpretation and dismiss the claims, since common law fraud was not proven.

POINT III

THE SUPREME COURT'S WARNINGS AGAINST LAWFARE IN *NRA V. VULLO* SHOULD NOT BE IGNORED BY THIS COURT

Appellants assert, and these a*mici* agree, that the trial court's interpretation of §63(12) empowers the Attorney General "to violate the First Amendment through targeted or retaliatory enforcement on the basis of political viewpoint...." Appellants' Br. at 54. Indeed, in view of recent events involving New York, it would be a mistake for this Court to view the AG's novel civil enforcement action against former President Trump in isolation. Sadly, the current State Government is developing a reputation for engaging in "lawfare" — the use of the legal system to achieve political objectives.

Only four months ago, in a case in which these *amici* filed an *amicus* brief,[6] a unanimous Supreme Court was forced to come down hard on New York State for misusing its authority to regulate business to effectively shut down the operations of an organization which key state officials opposed politically — the National Rifle Association ("NRA").

[6] *See* Brief Amicus Curiae of Gun Owners of America, *et al.*, *NRA v. Vullo*, No. 22-842 (Jan. 16, 2024)

Former Governor Cuomo had been a longtime vitriolic opponent of the NRA. In 2000, as then-Secretary of the U.S. Department of Housing and Urban Development, referring to the NRA, Cuomo stated, "[i]f we engage the enemy in Washington we will lose. They will beat us in this town."[7] Instead, Cuomo suggested, "[w]e're going to beat them state by state, community by community." *Id.*

Then, in 2014, after becoming Governor, Cuomo went so far as to say that those who are "pro-assault weapon ... have no place in the state of New York" because that's not who New Yorkers are.[8] It is hardly surprising that, four years later, Cuomo's Department of Financial Services issued a press release announcing Cuomo's order to Superintendent Maria T. Vullo and the DFS to declare war on insurance companies doing business with "the enemy." Cuomo stated on Twitter, "[t]he NRA is an extremist organization. I urge companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public."[9]

Governor Cuomo abused his powers to indulge his personal political views, requiring all nine justices to join together to make clear that the First Amendment

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[7] U.S. Department of Housing and Urban Development, "Remarks by Secretary Andrew Cuomo" (June 20, 2000)
[8] F. Dicker, "GOP blasts Cuomo's comments on conservatives," *New York Post* (Jan. 20, 2014)
[9] www.twitter.com/NYGovCuomo/status/987359763825614848

prohibits government officials from punishing speech on the basis of its viewpoint. In *NRA of Am. v. Vullo*, 602 U.S. 175 (2024), the Court stated, "[a]t the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society." *Id.* at 187. Thus, it is impermissible for government officials to "use the power of the State to punish or suppress disfavored expression." *Id.* at 188.

Now, in this case, both the People and trial judge have made their disdain for Trump, and their desire that he personally be punished, the world's worst-kept secret. It has been widely reported that "Letitia James fixated on Donald Trump as she campaigned for New York attorney general, branding the then-president a 'con man' and 'carnival barker.'"[10] In her 2018 campaign, she promised, "I will never be afraid to challenge this illegitimate president," adding, "I will be shining a bright light into every dark corner of his real estate dealings."[11] James' flamboyant promises to use the power of her office proactively to destroy Trump have rightly been described as "a template in how to create grounds for a selective prosecution case."[12]

What the AG and the trial judge have done in this case is precisely to "punish

[10] Associated Press, "NY Attorney General Letitia James Has a Long History of Fighting Trump and Other Powerful Targets," *U.S. News* (Sept. 28, 2023)
[11] D. Murdock, "Letitia James, Judge Engoron Wanted to Get Trump, Justice Be Damned," *Daily Signal* (Feb. 27, 2024)
[12] M. Naham, "NY AG's Words About Going After Trump Family Coming Back to Haunt Her," *Law and Crime* (Feb. 11, 2019)

unpopular opinion, rather than to compensate individuals for injury," which the Supreme Court has warned against. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Just as New York State imposed regulatory pressure on businesses to stop dealing with political opponents in *Vullo*, its selective use of New York State's authority to regulate businesses associated with presidential candidate Trump is likewise unconstitutional.

Nor can it be said that Justice Engoron was unbiased "umpire". Rather, he embraced every word spoken by a prosecution witness, while finding no merit in defense witnesses. Whenever a defense expert would explain that there had been no injury to any party (which the court itself conceded, *Trump II* at 7), the court disparaged the witness.

For example, in assessing the testimony of Professor Eli Bartov, the court stated: "By doggedly attempting to justify every misstatement, Professor Bartov lost all credibility in the eyes of the Court." *Trump II* at 132 (footnotes omitted). Regarding defense expert Robert Unell, the court stated, "On the whole, the Court was unable to ascribe any reliability to Unell's 'expert' opinions, finding them unresearched, unsupported, inconsistent, and contradicted by ample other documentary and testimonial evidence." *Id*. at 125-26. Contrast the court's description of state expert Michael McCarty, where it devoted an entire paragraph highlighting his *curriculum vitae*, specifically noting his work on "financing

engagements and underwriting projects" for the late Queen Elizabeth II. *Id.* at 105-106. The court gushed: "McCarty thoughtfully and logically explained why, contrary to defendants' assertions, using the default penalty rate would have been inappropriate...." *Id.* at 108

Most importantly, the court was enthralled with the People's key witness — Michael Cohen — who the judge conceded "was an important witness on behalf of the plaintiff...." *Id.* at 98. The court admitted that "[h]is testimony was significantly compromised by his having pleaded guilty to perjury and by some seeming contradictions in what he said at trial." *Id.* at 98-99 (emphasis added).

However, with that obligatory nod to Cohen's serial perjury out of the way, the court proceeded to credit essentially everything Cohen said that could support the AG's position and the court's prior summary judgment award. The court acknowledged that Cohen testified that "Donald Trump did not expressly direct him to reverse engineer financial statements," but that Trump had "ordered him to do so indirectly, in his 'mob voice.'" *Id*. at 99. Use of such a description drips hostility by the witness, and yet the Court found the characterization so meaningful that it repeated it before finding that "Cohen told the truth." *Id*. The court admitted that "the animosity between the witness and the defendant is palpable, providing Cohen with an incentive to lie..." *Id*. Nonetheless, "the Court found his testimony credible, based on [i] the relaxed manner in which he testified, [ii] the general plausibility of

his statements, and, most importantly, [iii] the way his testimony was corroborated by other trial evidence." *Id.*

Finally, the court admitted that "[a] less-forgiving factfinder might have concluded differently, might not have believed a single word of a convicted perjurer. This factfinder does not believe that pleading guilty to perjury means that you can never tell the truth. Michael Cohen told the truth." *Id.*

As if to put an exclamation point on his animus, the trial judge concluded his decision with an observation that Trump's "complete lack of contrition and remorse borders on pathological." *Trump II* at 198. And when the trial judge observed with respect to the conduct of which Trump is accused — that "everybody does it" (*Trump II* at 7) — he revealed that the targeting of Trump was selective, political, and again exhibited the kind of unconstitutional viewpoint discrimination that all nine Justices have just ruled unanimously was being practiced by New York State.

POINT IV

THE MASSIVE $435 MILLION PENALTY VIOLATES THE FOURTEENTH AMENDMENT'S DUE PROCESS PROTECTIONS

A. The Sheer Magnitude of the Penalty Makes the Award Suspect

The fine assessed against Trump is larger than the Gross Domestic Product of four of the world's nations.[13] Prominent lawyers have raised due process questions

[13] *See* www.worldometers.info/gdp/gdp-by-country/

based solely on the massive size of the Trump fine. "It is unheard of to seek repayment of over $464 million when there was no identifiable victim," said former Assistant U.S. Attorney John Malcolm.[14] Former deputy independent counsel Sol Wisenberg stated, "it seems to me there's some real constitutional problems with the $355 million judgment when there is no victim, no financial loss of any kind.... You have an argument for a substantive due process violation.... [I]t just seems to me to be an outrageous amount, given the judge's findings, that there's no ... victim, no monetary victim here…"[15] Even the Associated Press noted: "Trump's case stands apart in a significant way: It's the only big business found that was threatened with a shutdown without a showing of obvious victims and major losses."[16]

B. Unreasonable Fines Violate Due Process.

The Fourteenth Amendment's guaranty that "No State shall ... deprive any person of ... property, without due process of law" has long been understood to prohibit awards that are "unreasonable, arbitrary or capricious." *Nebbia v. New York*, 291 U.S. 502, 525 (1934). The award here violates all three standards. In *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996), the Supreme Court established "three guideposts" for determining whether a civil damages award is so grossly excessive

[14] B. Herlihy," Legal experts say Trump's whopping New York fee could be 'excessive' under Constitution: 'unheard of'," *Fox News* (Mar. 26, 2024)

[15] "Trump has 'ripe argument' for fighting 'outrageous' NYC civil fraud penalty, says legal expert," *Fox News* (Feb. 20, 2024)

[16] B. Condon, "Dissolving Trump's business empire would stand apart in history of NY fraud law," *Associated Press* (Jan. 29, 2024)

as to offend due process: "[i] the degree of reprehensibility of the nondisclosure; [ii] the disparity between the harm or potential harm suffered by [the plaintiff party] and [iii] his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *Id.* at 575

In an apparent effort to find "reprehensibility," the trial judge used highly charged language, stating that "[t]he frauds found here leap off the page and shock the conscience." *Trump II* at 176. He stated that Trump's alleged "lack of contrition and remorse borders on pathological." *Id*. at 198. Yet the court's own opinion demonstrates that the acts alleged are common and to be expected: "the common excuse that 'everybody does it' is all the more reason to strive for honesty and transparency and to be vigilant in enforcing the rules." *Trump II* at 7. Professor Jonathan Turley agrees with the court that "[u]ndervaluing and overvaluing property is a longstanding practice in New York real estate."[17] Further, "[t]he forms submitted by the Trump organization cautioned the banks to do their own estimates and the loans were paid in full and on time." *Id.* There were no unsophisticated victims, as the banks and insurance companies view it as their duty not to accept the representations of a business partner, but rather to perform their own "due diligence" investigation in any sizeable transaction.

[17] J. Turley, "Obscene award against Trump is testing the New York legal system's integrity," *The Hill* (Feb. 17, 2024)

As to the harm suffered, there is a complete lack of injury to any bank or insurance company — the parties allegedly defrauded. "[D]espite the false financial statements," the court conceded, "it is undisputed that defendants have made all required payments on time." *Trump II* at 7. As University of Michigan law professor William Thomas put it, "Who suffered here? We haven't seen a long list of victims."[18] Professor Turley points out, "[i]ndeed, witnesses testified that they wanted to do more business with Trump, who was described as a 'whale' client with high yield business opportunities."[19]

With respect to comparability, the Guinness Book of World Records states that the largest fine ever imposed on an individual is the $200 million fine imposed on bond-scammer Michael Milken in 1990.[20] Milken's fine involved criminal conduct, not just civil matters, and the fine was less than half that imposed on Trump. Although some larger fines have been assessed against corporations, they are primarily against large publicly-traded companies, not comparatively small closely-held corporations such as Trump's. The fine is the fifth-largest in the United States in 2024, and the larger fines were all levied against publicly-traded corporations such

[18] R. DeSoto, "NY Gov. Kathy Hochul Scrambles to Get Businesses to Stay, Tries to Downplay Massive Fine Against Trump," *Western Journal* (Feb. 19, 2024).
[19] J. Turley, "Obscene award against Trump is testing the New York legal system's integrity," *The Hill* (Feb. 17, 2024).
[20] *See* www.guinnessworldrecords.com/world-records/71121-largest-fine-imposed-on-an-individual

as J.P. Morgan Chase.[21] The next-largest fine imposed on an individual this year was the $111 million fine against cryptocurrency compliance officer Irina Dilkinska for crypto fraud; the third-highest individual fine in 2024 is less than $3.5 million, 1 percent of Trump's fine. *See id.*

The *BMW* Court identified the method to follow in determining whether a damages award is so excessive as to offend due process. "[T]he proper inquiry is whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred." *BMW* at 581.

With the trial court admitting the businesses involved suffered no harm, the only possible basis left for an award against Trump is the State's ethereal "interest in an honest marketplace" (*Trump II* at 6), here being pursued to make an example out of a political enemy. Indeed, if that is the court's theory, it again fails on due process grounds, with the abundant evidence that the AG and the judge were following the advice of Stalinist Soviet jurist Andrey Vyshinsky to investigate the man to find the crime. As former deputy special counsel Sol Wisenberg stated, "This case never would have even been brought against anybody other than Donald Trump. You have no victim. You have no loss. The loans were repaid. The banks

[21] M. Fisher, "Research: The largest corporate fines in 2024 so far," *TradingPedia.com* (May 15, 2024).

never complained about any of this."[22]

The sort of broad "equitable powers" the New York court claims to possess destroys all concept of providing "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose," as *BMW* requires. *BMW* at 574. The only upper limit to possible fines, whenever a court finds "persistent fraud," is the limit of the personal sensibilities of the trial judge. That, as this case proves, provides no standard at all.

POINT V

THE MASSIVE $435 MILLION PENALTY VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION OF EXCESSIVE FINES

In 2019, the Supreme Court put to rest the question of whether the Eighth Amendment's protection against "excessive fines" is incorporated against the states by the Fourteenth Amendment's due process clause. *See Timbs v. Indiana*, 586 U.S. 146 (2019).[23] The Court ruled that "[f]or good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies, as the Stuarts' critics learned several centuries ago." *Id.* at 153-54

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[22] H. Hutchison, "'A Clown': Sol Wisenberg Breaks Down Why 'Obviously Biased' Judge Is Bringing Case Against Trump," *Daily Caller* (Nov. 10, 2023)

[23] "Protection against excessive punitive economic sanctions secured by the Clause is ... both fundamental to our scheme of ordered liberty and deeply rooted in this Nation's history and tradition." *Id.* at 154 (internal quotations omitted)

The Supreme Court's concerns have been vividly illustrated in this case. Judge Engoron said of Trump in 2022, that he is "just a bad guy" who the AG "should go after as the chief law enforcement officer of the state."[24] Engoron has donated thousands of dollars to Democrats over the past quarter-century, with no donations to Republicans.[25] The AG made her political career on promises to charge Trump. As the Associated Press reports, "Letitia James fixated on Donald Trump as she campaigned for New York attorney general, branding the then-president a 'con man' and 'carnival barker.'"[26] Having campaigned on promises to charge Trump, she worked hard to deliver.

An additional principle applicable here can be drawn from the *Timbs* decision, which quoted from an *amicus* brief filed by the American Civil Liberties Union that cautioned: "Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue." Based on that warning, the High Court stated:

> Even absent a political motive, fines may be employed in a measure out of accord with the penal goals of retribution and deterrence, for fines are a source of revenue, while other forms of punishment cost a State money.... [I]t makes sense to scrutinize governmental action more closely when the State

[24] Rep. E. Stefanik, "Letter to New York State Commission on Judicial Conduct" (Nov. 10, 2023).
[25] B. Scher, "New York Judge Caught Smiling During Trump Trial Is Lifelong Democrat Donor," *Daily Wire* (Oct. 2, 2023)
[26] Associated Press, "NY Attorney General Letitia James Has a Long History of Fighting Trump and Other Powerful Targets," *U.S. News* (Sept. 28, 2023)

> stands to benefit. This concern is scarcely hypothetical. *Timbs* at 154 (internal quotations omitted).

Here, AG, having obtained an award of funds greater than the entire budget of her department, has lifted a great burden from the taxpayers and placed it squarely on the back of one family business. The trial judge fixed the award based in part on higher interest payments that the Trump organization should have paid to banks, but then ordered that the bank's lost interest must be paid over to New York State. Surely this award requires the closest scrutiny of this court.

It is beyond dispute that both the AG and trial judge intended the award as punishment. "The frauds found here leap off the page and shock the conscience," the trial judge wrote. *Trump II* at 176. Although the fraud charged was civil, he cited at length case law for criminal fraud. "The crime of conspiracy is an offense separate from the crime that is the object of the conspiracy. The essence of the offense is an agreement to cause a specific crime to be omitted together with the actual commission of an overt act by one of the conspirators in furtherance of the conspiracy." *Id.* at 182-183. "[T]he Donald J. Trump Revocable Trust is also liable for the criminal acts of its agents," he asserted. *Id.* at 184. Noting that "a defendant's 'corrupt intent or desire for personal profit'" is relevant to the question of prejudgment interest in New York, the court-imposed prejudgment interest. *Id.* at 193. "Their complete lack of contrition and remorse borders on pathological," Engoron asserted. "[D]efendants are incapable of admitting the error of their ways."

Id. at 198-99.

After the trial court ruled, the AG posted on X about how her suit had brought down the Trump family: "In a massive victory, we won our case against Donald Trump for engaging in years of incredible financial fraud to enrich himself. Trump, Donald Trump, Jr., Eric Trump, and his former executives must pay over $450 million in disgorgement and interest."[27] "[W]hite-collar financial fraud is not a victimless crime," she stated.[28] As the *Wall Street Journal* editorial board noted, "Ms. James ran for office promising to indict Mr. Trump, which is the opposite of the way justice should be done. You're supposed to find a crime and then identify the perpetrator. Ms. James declared Mr. Trump could 'be indicted for criminal offenses' and has hunted ever since for a crime to charge him with."[29] Not finding one, she has treated the civil fraud trial as its equivalent.

The test for evaluating whether an Eight Amendment violation has occurred has been articulated by the Second Circuit as incorporating at least four non-exhaustive factors (1) the essence of the [underlying offense] ... and its relation to other criminal activity, (2) whether the [person fined] fits into the class of persons for whom the statute was principally designed, (3) the maximum sentence and fine

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[27] Letitia James post (Feb. 16, 2024) www.x.com/NewYorkStateAG/status/1758602156599369914?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1758602156599369991

[28] I. Schwartz, "AG Letitia James: The Scale And Scope Of Donald Trump's Fraud Is Staggering, And So Is His Ego," *Real Clear Politics* (Feb. 16, 2024)

[29] "Letitia James vs. the Trump Family," *Wall Street Journal* (Sept. 22, 2022)

that could have been imposed, and (4) the nature of the harm caused by the [complainant's] conduct. *United States v. Viloski*, 814 F.3d 104, 108 (2d Cir. 2016).

The Second Circuit summed up the Supreme Court's test for excessiveness as "the test for the excessiveness of a punitive forfeiture involves *solely* a proportionality determination." *Id.* at 111 (quotation omitted). In *Dorce v. City of New York*, 608 F. Supp. 3d 118 (S.D.N.Y. 2022), since "the value of the property taken — and therefore the amount of the fine imposed — was substantially more than the taxes owed," the court denied a government motion to dismiss the citizen's Eighth Amendment claim. *Id.* at 144. Here, where the court conceded there were no financial damages suffered, the award defies comparison to the harm. Mathematically speaking, the penalty is infinitely greater than the offense.

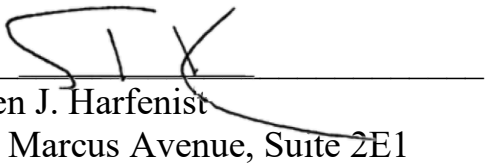
The combination of the relentless politicization of the case by the judge and prosecutor, the unprecedented penalties, and the fact that the award would be paid over not to a business that was harmed but to the State, should trigger every alarm raised by the Eighth Amendment itself and the cases applying it. If the fines imposed in this case do not violate the Eighth Amendment's protection, it is difficult to imagine a fine that would.

CONCLUSION

For the foregoing reasons, the decision of the trial court should be reversed, and the Complaint dismissed.

Dated: Lake Success, New York
August 2, 2024

Respectfully submitted,
HARFENIST KRAUT & PERLSTEIN, LLP

By: 

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