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No. 2023-04925

IN THE SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

DONALD J. TRUMP, ET. AL,

Defendants-Appellants,

-against-

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

Plaintiff-Respondent.

On Appeal from the Supreme Court, New York County,
Hon. Arthur F. Engoron
Index No: 452564/2022

THE AMERICAN CENTER FOR LAW AND JUSTICE'S NOTICE OF MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS

ALEXANDER LONSTEIN
Law Offices of Alexander Lonstein
[redacted]

JAY ALAN SEKULOW
Counsel Of Record
JORDAN A. SEKULOW
STUART J. ROTH
ANDREW J. EKONOMOU
WALTER M. WEBER
BENJAMIN P. SISNEY
NATHAN J. MOELKER
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
Attorneys for Amicus Curiae

PLEASE TAKE NOTICE that, pursuant to 22 N.Y.C.R.R.§§ 1250.4(f) and 600.4(b), and upon the annexed Affirmation of Benjamin P. Sisney, dated July 22, 2024, and all exhibits attached thereto, including a copy of its proposed brief, proposed *amicus curiae* the American Center for Law and Justice moves this Court, located at 27 Madison Avenue, New York, New York 10010, on July 24, 2024, at 10:00 am, or as soon thereafter as is practicable, for an order permitting *amicus* American Center for Law and Justice to serve and file a brief as *amicus curiae* in support of former President Donald Trump and the Defendants in the above-captioned appeal, and granting such other and further relief as the Court deems just and proper.

Dated: July 23, 2024

Respectfully submitted,

/s/ Alexander Lonstein
ALEXANDER LONSTEIN
Law Offices of Alexander Lonstein
[redacted]

/s/ Jay Alan Sekulow
JAY ALAN SEKULOW
Counsel Of Record
JORDAN A. SEKULOW
STUART J. ROTH
ANDREW J. EKONOMOU
WALTER M. WEBER
BENJAMIN P. SISNEY
NATHAN J. MOELKER
AMERICAN CENTER
FOR LAW & JUSTICE
[redacted]
Attorneys for Amicus Curiae

PROOF OF SERVICE

The foregoing document has been e-filed and, pursuant to Rule 1245.7(B), the foregoing document was served electronically on all counsel of record.

Dated: July 23, 2024

Respectfully submitted,

/s/ Jay Alan Sekulow

JAY ALAN SEKULOW
Counsel of Record
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
Attorney for Amicus Curiae

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AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF DEFENDANTS-APPELLANTS

ALEXANDER LONSTEIN
Law Offices of Alexander Lonstein
[redacted]

JAY ALAN SEKULOW
Counsel Of Record
JORDAN A. SEKULOW
STUART J. ROTH
ANDREW J. EKONOMOU
WALTER M. WEBER
BENJAMIN P. SISNEY
NATHAN J. MOELKER
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
Attorneys for Amicus Curiae

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INTEREST OF AMICUS CURIAE

Amicus curiae, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law, including the first freedom, the right of free expression protected by the First Amendment. ACLJ attorneys have appeared often before the United States Supreme Court as counsel for parties, *e.g.*, *Trump v. Anderson*, 144 S. Ct. 662 (2024); *Heritage Foundation v. Parker*, U.S. No. 21A249 (2021); and *Trump v. Vance*, 140 S. Ct. 2412 (2020); or for *amici*, *e.g.*, *Fischer v. United States*, 144 S. Ct. 2176 (2024); and *McDonnell v. United States*, 579 U.S. 550 (2016), addressing various constitutional issues, including those impacted by overaggressive and politicized government enforcement impugning the First Amendment.

The ACLJ's specific concern is the preservation of the First Amendment against selective law enforcement that threatens First Amendment speech. The ACLJ files this brief on behalf of its members who reside in New York, as the civil judgment in this case poses a threat to all New Yorkers and their ability to speak freely. The ACLJ also files this brief on behalf of its members who do not reside in New York, as the prosecutorial actions and ruling below impact their ability to meaningfully vote for the President of their choice and to freely express their political views, as well as their ability to conduct business in New York.

SUMMARY OF THE ARGUMENT

The tools of law enforcement must never be turned into weapons against political activity. The First Amendment prohibits government officials, from the most minor local officer to the Attorney General of New York, from using their power and authority to target the speech of those they dislike. No official has the authority to use their power to target speech through selective enforcement.

And that is exactly what happened here. Facts in the public record demonstrate that the New York Attorney General Letitia James (the "Attorney General") has taken the New York Executive Law, N.Y. Exec. Law § 63(12) (Consol.), and using it to attack President Trump for his political activity and speech. The Attorney General expressly ran for her office on a platform of prosecuting President Trump for his political speech and activity. She then did so, using the law in unprecedented ways to seek financial penalties and the dissolution of President Trump's businesses, based on her disagreements with his political views. She has wielded her power to target a political opponent for his speech. This targeted act of retaliatory law enforcement is a violation of the First Amendment.

The Attorney General cannot justify her conduct by purported reliance on any New York law; as the United States Supreme Court has made manifest, a state official cannot use the fig leaf of reliance of state law to justify First Amendment retaliation and targeted, politicized law enforcement activity. *NRA of Am. v. Vullo*,

144 S. Ct. 1316, 1332 (2024). No interpretation of state law authorizes the Attorney General to engage in politicized prosecutions. Just as the Supreme Court emphasized in *Vullo,* although the Attorney General can pursue violations of state law, she cannot do so for the reason of seeking to punish or suppress President Trump's protected expression. Contentions that President Trump violated New York law does not excuse the Attorney General to use the law and coercive threats to stifle his speech. It does not matter whether she alleges a meaningful violation of state law or not; regardless, the Attorney General has impermissibly used her authority to target the political speech of her opponent.

The First Amendment problems in this case are particularly exacerbated by the "fraud" code section used by the Attorney General in which intent, scienter, and reliance are not elements. Under such an unfettered statute, the Attorney General has ample freedom to do exactly what she did here, using her power to target speech she dislikes. Moreover, she did so here by achieving a penalty unprecedented in its scope and breadth. The First Amendment problems in this case were aggravated by the unparalleled and unprecedented disgorgement judgment here of over 350 million dollars. That judgment will unconstitutionally chill speech as a result of the Attorney General's First Amendment retaliation.

ARGUMENT

The Constitution forbids the government from using the law as a weapon to

stifle political speech. In recognition of the core constitutional principle that the government must never be in the business of proscribing political activity, the Supreme Court has regularly emphasized that "the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech." *NRA of Am. v. Vullo*, 144 S. Ct. 1316, 1332 (2024). The Constitution protects speech and political activity from prosecution or government punishment, regardless of whether it is disfavored, opposed, or classified by a government official as "half-truths" or "misinformation." *New York Times Co. v. Sullivan*, 376 U.S. 254, 272-73 (1964) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 342 (1946)).

The New York Attorney General has violated this prohibition, taking the New York Executive Law, Exec. Law § 63(12), and turning it into a sword wielded against the First Amendment. Without traditional safeguards like the requirement of intent, section 63(12) can be used to attack any statement, no matter how benign. And such a broad and standardless statute is the perfect implement for what occurred here—the political targeting of a political opponent for political activity. This judgment of 355 million dollars for alleged actions that harmed no one and had no victims is inconsistent with and a violation of the First Amendment.

I. The Action and the Judgment Against President Trump Was Motivated by His Political Speech and Accordingly a Violation of the First Amendment.

At the core of the First Amendment is a protection against retaliation for

political activity. "[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006); *see Gonzalez v. Trevino*, 144 S. Ct. 1663, 1667 (2024). The First Amendment ensures that government officials may not rely on the "threat of invoking legal sanctions and other means of coercion . . . to achieve the suppression" of disfavored speech. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).[1] Emphasizing the dangers of the threat of government repression for protected speech, the Supreme Court has stressed, "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *New York Times Co.*, 376 U.S. at 278.

Specifically, the Constitution forbids the use of the authority and power of government to suppress unfavored beliefs and views. "'Ideologically driven attempts to suppress a particular point of view are *presumptively unconstitutional.*'"

[1] These First Amendment principles reflect something fundamental about the authority entrusted to the executive: in the criminal context, the Supreme Court has emphasized that a

> state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.

Young v. United States ex rel. Vuitton Et Fils S. A., 481 U.S. 787, 814 (1987). The same is true in the civil context; whether as a civil enforcement action or as a criminal action, a state official has substantial power over people's lives, a power easily subject to misuse.

Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995) (emphasis added) (citation omitted); *see also Viereck v. United States*, 318 U.S. 236, 245, 251 (1943) (emphasizing that the Constitution requires that "men are not subjected to criminal punishment because their conduct offends our patriotic emotions or thwarts a general purpose sought to be effected by specific commands which they have not disobeyed").[2]

A. The Public Record Undisputedly Demonstrates That the Attorney General Brought Her Action Against Trump in Retaliation for His First Amendment Rights.

The public record in this matter demonstrates beyond doubt that the Attorney General targeted President Trump for his political activity. In *NRA of America v. Vullo*, the Supreme Court emphasized that "[g]overnment officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors." 144 S. Ct. at 1322. The Supreme Court held that the NRA successfully pled a claim that Maria Vullo, former superintendent of this state's Department of Financial Services, violated the First Amendment "by threatening enforcement actions against those entities that refused to disassociate from the NRA and other gun-

[2] The founders likewise warned of the dangers of stifling political speech through the executive. James Madison, *Report on the Virginia Resolutions*, *in* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* 546, 553-54 (Jonathan Elliot ed., 2nd. ed. 1836) (Sedition Act, targeting certain forms of speech, was "levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.")

promotion advocacy groups." *Id.* Vullo took actions toward entities that transacted with the NRA in ways she could claim were facially appropriate, threatening enforcement of apparently real infractions of New York's insurance laws. *Id.* at 1326. But she did so explicitly because she sought to use her power and authority to weaken the NRA. That is not allowed. While a government official can freely express her views, "[w]hat she cannot do, however, is use the power of the State to punish or suppress disfavored expression." *Id*. In short, the First Amendment prohibits New York's officials from using their office and authority to target political rivals. Otherwise-authentic enforcement powers must never be used to target the First Amendment rights of political opponents. Vullo engaged in her violations of the First Amendment "by saying she would ignore unrelated infractions and focus her enforcement efforts on NRA-related business alone." *Id.* at 1329. Vullo "singled out the NRA and other gun-promotion organizations as the targets of her call to action." *Id.* at 1330. This, the United States Supreme Court has held, violates the First Amendment.

Just as Vullo "threatened to wield her power against those refusing to aid her campaign to punish the NRA's gun-promotion advocacy," *id.*, so too has the Attorney General threatened to and actually has executed her threat to use her power to specifically target and punish President Trump for his political activity and speech. Unlike Vullo, she has not even tried to conceal that fact; she has very publicly

admitted that the primary goal of her election to be Attorney General was to attack President Trump. Moreover, just as Gonzalez was able to show "that no one has ever been arrested for engaging in a certain kind of conduct," *Gonzalez*, 144 S. Ct. at 1667, the facts of the public record here demonstrate President Trump was uniquely singled out by the Attorney General for punishment for his political speech.

The Court in *NRA v. Vullo* emphasized Vullo's broad authority to regulate; that authority "serves as a backdrop to the NRA's allegations of coercion. The power that a government official wields, while certainly not dispositive, is relevant to the objective inquiry of whether a reasonable person would perceive the official's communication as coercive." *Vullo*, 144 S. Ct. at 1328-29. The Attorney General's authority is comparable to Vullo's authority, in that she can initiate investigations and enforcement actions, but her authority is actually even more extensive. She is one of the most powerful law enforcement officers in the country, with laws that "provide[] her with sweeping investigatory and prosecutorial powers" to engage in investigations and enforcement.[3] The Attorney General possesses a "sweeping statutory array of prosecutorial and other law-enforcement authority: . . . and other powers too numerous to mention." *People v. Gilmour*, 98 N.Y.2d 126, 131 n.7, 773 N.E.2d 479, 482 n.7 (2002). She has been invested with broad and substantial

[3] Allan Smith, *NY's Attorney General Is One of the Most Powerful in the Nation. That Should Worry Trump*, NBC News (Apr. 1, 2019), https://www.nbcnews.com/politics/donald-trump/ny-s-attorney-general-one-most-powerful-nation-should-worry-n985086.

authority to regulate, and the ability to impose, as was at issue here, dissolution, a "'judgment . . . of corporate death,' which 'represent[ed] the extreme rigor of the law.'" *California v. Am. Stores Co.*, 495 U.S. 271, 289 (1990) (quoting *People v. N. River Sugar Refin. Co.*, 121 N.Y. 582, 608, 24 N.E. 834, 834 (1890)). James' authority is far broader than Vullo's could ever be, and she possesses a broad and far-ranging ability to impose penalties and threaten speech with draconian punishment. It against that backdrop that the Attorney General exercised her authority to target President Trump for political reasons.

In contrast with Vullo, who did her best to at least try to conceal her political targeting, the Attorney General openly and brazenly promised to use her office to target political opponent President Trump. Immediately after she was elected, she promised to use her office to investigate President "Trump, his family[,] and 'anyone' in his circle."[4] In her first extensive interview upon being elected, she promised, "[w]e will use every area of the law to investigate President Trump and his business transactions and that of his family as well." *Id.* She further promised '"to investigate anyone in his orbit"' and to seek to prosecute for state offenses those people pardoned by President Trump from federal offenses. *Id.* She also hired people for her office "with an eye on bringing in experts for its Trump-related investigations." *Id.* She made

[4] Allan Smith, *Incoming New York Attorney General Plans Wide-ranging Investigations of Trump and Family*, NBC News (Dec. 12, 2018), https://www.nbcnews.com/politics/donald-trump/incoming-new-york-attorney-general-plans-wide-ranging-investigations-trump-n946706.

very clear what she viewed her role as Attorney General to be: "[t]aking on President Trump." *Id.*

In her campaign for her position, the Attorney General expressly ran on a platform of targeting President Trump for his political speech. In one campaign speech, for example, she stated:

> We are angrier and more deeply divided than we've ever been at any point in our history since the civil war. And at the eye of the storm is Donald Trump, ripping families apart, threatening women's most basic rights. **I am running for Attorney General because I will never be afraid to challenge this illegitimate president when our fundamental rights are at stake.**
> . . .
>
> I believe that this president is incompetent. I believe that this president is ill equipped to serve in the highest office of this land. And I believe that he is an embarrassment to all that we stand for. He should be charged with obstructing justice. I believe that the president of these United States can be indicted for criminal offences. And we would join with law enforcement and other attorneys general cross the nation in removing this president from office. In addition to that, the office of attorney general will continue to follow the money because we believe that he has engaged in a pattern and practice of money laundering . . . particularly related to his real estate holdings.
>
> It's important that everyone understand that the days of Donald Trump are coming to an end . . . . And **it starts with electing an attorney general who will never back down when Trump or anyone else threatens our rights**. So I hope that you will join me and vote on Thursday September 13th in quiet dignity and defiance.[5]

[5] NowThis Impact, *Why Letitia James Wants to Take on Trump as NY's Attorney General*, YouTube (Sept. 28, 2018) (emphasis added), https://www.youtube.com/watch?v=D1yj0NKSsuU.

In this campaign speech, disseminated widely by the progressive organization NowThis, the Attorney General openly and proudly indicated that she became attorney general in order to go after President Trump, and that she specifically targeted him for his political views and speech, such as for example, his stance on abortion, which she described as "women's most basic rights." *See id.*

In her victory speech after being elected, likewise, the Attorney General said her win "was about that man in the White House who can't go a day without threatening our fundamental rights."[6] She went on to promise to bring legal action against President Trump: "As the next attorney general of his home state" . . . "I will be shining a bright light into every dark corner of his real estate dealings, and every dealing, demanding truthfulness at every turn." *Id.*

Her campaign speeches were full of similar statements. She regularly made statements promising to target President Trump for his political speech: "[t]hat president, because he is not my president, he is an illegitimate president. . . . His days are numbered! His days are numbered!"[7] In other speeches she told people, "[w]e've got to get ready to mobilize and we've got to get ready to agitate and irritate until victory is won but more importantly until Trump is defeated." *Id.* Elsewhere,

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[6] Erin Durkin, *Tish James Just Sued Trump – But They've Been at It for Years,* Politico (Sept. 22, 2022, 6:25 PM), https://www.politico.com/news/2022/09/21/james-lawsuit-trump-longstanding-battle-00058128.

[7] Citizen Free Press (@CitizenFreePres), X (April 20, 2024, 10:33 PM), https://x.com/CitizenFreePres/status/1781873969563316463.

"[w]e will all rise up and resist this man . . . and ultimately will bring him down!" *Id.*

There are many examples of similar statements. When one community activist asked the Attorney General before the election why people should vote, the Attorney General said that people should vote in reaction to Donald Trump[8]–a sentiment perfectly fine for a candidate to express as a political rallying point or slogan. But then, the Influencer asked the Attorney General, "Will you sue him for us?" *Id.* The Attorney General replied with a promise to sue President Trump: "Oh, we're gonna definitely sue him. We're gonna be a real pain in the ass. He's going to know my name personally." *Id.* Thus, the problem is that she actually *used her power* to target President Trump. In another video, the Attorney General said in a speech that ". . . no one is above the law, including this illegitimate president. And so, I look forward to going into the office of attorney general every day, suing him, defending your rights and then going home."[9] Repeatedly the Attorney General attacked the legitimacy of the electoral process and President Trump's election and called for President Trump to be targeted for his political speech. She said what she was going to do, then she did it. As commendable as following through on a campaign promise

[8] Adina Sash (@flatbushgirl), Instagram (Nov. 7, 2018), https://www.instagram.com/p/Bp4waV1AMQ0/?utm_source=ig_web_copy_link.
[9] Letitia James, Facebook (July 19, 2018), https://www.facebook.com/watch/?v=203059860348974.

might be, it is unlawful when the promise was to do something unconstitutional–using the power to punish an American in violation of the First Amendment.

This evidence of the Attorney General's intent to engage in a political prosecution is bolstered by another fact, also in the public record. The Supreme Court has emphasized that a plaintiff can sue for retaliatory action, such as a retaliatory arrest, "if he produces 'objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.'" *Gonzalez*, 144 S. Ct. at 1666-67 (quoting *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019)). In *Gonzalez*, the Court emphasized the need for objective evidence that an arrest occurred in "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* at 1728 (Thomas, J., concurring) (quoting *Nieves*, 139 S. Ct. at 1727). Gonzalez's objective evidence was a survey she performed, evidencing that the statute in question had never been applied before to her political conduct. *Id.* at 1666-67. This evidence of the uniqueness of the charge against her was significant evidence that she was able to use to argue "that the defendants had engaged in a political vendetta by bringing a 'sham charge' against her." *Id.* at 1667.

Here, that evidence was gathered by an outside observer. The Associated Press conducted its own research and has confirmed that "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."[10] The Associated Press pointed out that its "review of nearly 150 reported cases since New York's 'repeated fraud' statute was passed in 1956 showed that nearly every previous time a company was taken away, victims and losses were key factors." *Id.* In other words, just as Gonzalez provided evidence that she was directly targeted in an unprecedented fashion, the evidence here likewise demonstrates that President Trump was targeted in a way never seen before, pursued for penalties in a situation where no one else would have been because there were no victims or losses. This also demonstrates that he was targeted for political reasons.

In short, the evidence in this case that the Attorney General engaged in political retaliation against President Trump in violation of the First Amendment is a matter of public record. The Attorney General openly campaigned on prosecuting President Trump based on his political activity. She then did so, in a manner unprecedented under New York law. This case clearly falls under *Gonzalez* and *Vullo.*

B. The Political Targeting of President Trump Was Unconstitutional, Regardless of Whether It Was Purportedly Authorized by New York Law.

The Attorney General cannot justify her conduct on the theory that she was pursuing alleged actual violations of New York law. Critically, the First Amendment

[10] Bernard Condon, *Dissolving Trump's Business Empire Would Stand Apart in History of NY Fraud Law*, Associated Press, https://apnews.com/article/trump-fraud-business-law-courts-banks-lending-punishment-2ee9e509a28c24d0cda92da2f9a9b689 (Jan. 29, 2024, 7:58 PM).

issue here is wholly independent of whether the Attorney General was right or wrong in her interpretation of the law. Regardless, the First Amendment *forbids* the Attorney General from using her power to target political opponents. In *Vullo*, the Supreme Court explained at length why Vullo could not justify her conduct by arguing that the insurers' activity was illegal: "the conceded illegality of the NRA-endorsed insurance programs does not insulate Vullo from First Amendment scrutiny under the *Bantam Books* framework." *Vullo*, 144 S. Ct. at 1331.

Unlike here, in *Vullo* the parties conceded that Vullo was targeting technically illegal activity. It did not matter. The seminal case on First Amendment targeting is *Bantam Books*, *Inc.* v. *Sullivan*, 372 U.S. 58 (1963). The Court in *Vullo* emphasized that nothing in *Bantam Books* "turned on the distributor's compliance with state law." *Vullo*, 144 S. Ct. at 1331. The Court held that "although Vullo can pursue violations of state insurance law, she cannot do so in order to punish or suppress the NRA's protected expression. So, the contention that the NRA and the insurers violated New York law does not excuse Vullo from allegedly employing coercive threats to stifle gun-promotion advocacy*." Id.* The Court's analysis in *Vullo* was not focused on whether Vullo had probable cause and authority for her conduct; in fact, the fact that she had the authority to engage in the conduct that she did was significant because it highlighted the coercive nature of her conduct. *Id.* at 1328-29. Vullo's avowed purpose was to penalize the NRA for its viewpoint—not because that viewpoint

conflicted with New York's banking and insurance laws, but because she personally favored the other side of a charged political debate. Accordingly, "the contention that the NRA and the insurers violated New York law does not excuse Vullo from allegedly employing coercive threats to stifle" disfavored advocacy. *Id.* at 1331.

Likewise, Gonzalez had been charged for intentionally removing a government record but only because her political activities had made her a target. She documented that she had been singled out for this charge and uniquely prosecuted in ways no one else had been. In such a circumstance, probable cause is irrelevant; instead, "the fact that no one has ever been arrested for engaging in a certain kind of conduct—especially when the criminal prohibition is longstanding and the conduct at issue is not novel—makes it more likely" that the legal action was targeted against her. *Gonzalez*, 144 S. Ct. at 1667. Gonzalez did *not* need to show that her action was lawful. On the contrary, she conceded that her arrest was supported by probable cause, in other words, that there was objective evidence that she had violated a law. But that did not matter, because she could present "objective evidence that [s]he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.* at 1666 (quoting *Nieves*, 139 S. Ct. at 1727).

The Constitution protects against retaliation for First Amendment activity, and an argument that activity was unlawful under state law does not overcome that protection. *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018). In *Lozman*, the

defendant alleged that "high-level city policymakers adopted a plan to retaliate against him for protected speech and then ordered his arrest when he attempted to make remarks during the public-comment portion of a city council meeting." *Id.* at 1949. There too, the existence of probable cause for arrest was conceded; the petitioner failed to depart the podium after a lawful order to leave. *Id.* at 1951. In a straightforward fashion, Lozman had likely committed a violation of law. But regardless of the existence of probable cause, the arrest was nonetheless a violation of the First Amendment. "Lozman alleges the City deprived him of this liberty by retaliating against him for his lawsuit against the City and his criticisms of public officials. Thus, Lozman's speech is high in the hierarchy of First Amendment values." *Id.* at 1955. Lozman's speech was robustly protected, regardless of the fact that the proceedings brought against him were technically lawful, because those proceedings *constituted* retaliation against him for First Amendment speech.

In short, the First Amendment issue here is not dependent on the Court's analysis of New York law; regardless, the Attorney Generally impermissibly used her authority to target a political opponent. No complex line-drawing or balancing is required to find such conduct unconstitutional. When government officials threaten and then adopt legal sanctions to suppress a disfavored message, they impair the free exchange of ideas that the First Amendment is designed to protect.

As in *Vullo* and *Gonzales*, the Attorney General cannot misuse her position to

target political opponents. Her explicit purpose was to punish President Trump for his viewpoint. This is a First Amendment violation, regardless of her view of New York law.

C. By Removing Barriers on Fraud Enforcement, New York Law Is Particularly Susceptible to First Amendment Retaliation.

While styled "fraud," the action brought against President Trump was very different. The broad and unfettered authority given the Attorney General under section 63(12) is what has enabled her to engage in the political targeting demonstrated here. From the beginning, a civil action for fraud was very narrow and specific, requiring proof that a defendant knowingly made a false statement of material fact with intent to deceive, causing injury. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 578-79, 106 N.E.3d 1176, 1182 (2018) ("The required elements of a common-law fraud claim are 'a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.'" (quoting *Pasternack v. Lab'y Corp. of Am. Holdings*, 27 N.Y.3d 817, 827, 59 N.E.2d 485, 491 (2016)).

Here, none of the alleged misstatements was ever intended to cost anyone anything (nor did it). But it did not matter, because under section 63(12), no proof of intent to cause harm is required: "[g]ood faith or lack of fraudulent intent is not in issue." *In re. State v. Interstate Tractor Trailer Training, Inc.*, 321 N.Y.S.2d 147, 151

(N.Y. Sup. Ct. 1971) (holding liability under Executive Law § 63(12) does not require demonstrating an "intent to defraud"). Moreover, the court below here conceded that "the record is devoid of any evidence of default, breach, late payment, or any complaint of harm." *People v. Trump*, No. 452564/2022, 2023 N.Y. Misc. LEXIS 5705, at *16 (N.Y. Sup. Ct. Sept. 26, 2023). But this too did not matter, as under §63(12), the penalty of disgorgement is available "notwithstanding the absence of loss to individuals or independent claims for restitution." *People v. Ernst & Young, LLP*, 980 N.Y.S.2d 456, 457, 114 A.D.3d 569, 569 (N.Y. App. Div. 2014). How convenient.

Thus, this interpretation of New York law leaves defendants in a position where neither fraudulent intent nor actual losses to others are necessary for the Attorney General to bring an action for "fraud." Instead, the law defines "fraud" merely as "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions." Exec. Law § 63(12). Accordingly, the statute provides a license for the Attorney General to pursue anyone based on any alleged inaccuracy and regardless of whether anyone has been harmed, just as she did here. By removing the inherent protections of traditional fraud law, the Executive law enables political opponents to be prosecuted, albeit civilly, under a regime of strict liability, regardless of any actual culpability or mental state. In short, defendants are in a position where intent, scienter,

and reliance are not elements of a stand-alone section 63(12) claim.

Aside from whether such a statute is facially constitutional, these provisions further demonstrate the First Amendment problems here and why this law is particularly subject to political misuse. The Supreme Court has held that "the First Amendment does not shield fraud." *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003). But while it is true fraud that is prohibited: it is the "intentional lie" that is "no essential part of any exposition of ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). The Supreme Court has made very clear that it is only intentional misstatements that are prohibited, and accidental misstatements would be constitutionally protected. *Illinois ex rel. Madigan*, 538 U.S. at 606 ("While bare failure to disclose that information directly to potential donors does not suffice to establish fraud, when nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener, the First Amendment leaves room for a fraud claim."). The authority of the state, in other words, extends to protect against *intentional* fraud; the key indicia of fraud to exempt speech from constitutional protection is evidence that speech is "intentionally misleading." *Id.* There was no such evidence here.

In *Madigan*, the Supreme Court explained the necessity, to ensure that fraud law does not become a threat to the First Amendment, of the elements rejected by the Attorney General here.

> Of prime importance, and in contrast to a prior restraint on solicitation, or a regulation that imposes on fundraisers an uphill burden to prove their conduct lawful, in a properly tailored fraud action the State bears the full burden of proof. False statement alone does not subject a fundraiser to fraud liability. As restated in Illinois case law, to prove a defendant liable for fraud, the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false; further, the complainant must demonstrate that the defendant made the representation with the intent to mislead the listener, and succeeded in doing so.

Id. at 620. Without this careful limitation, there are insufficient protections for protected speech: such a limitation is necessary to ensure there is "sufficient breathing room for protected speech." *Id.* The First Amendment requires, in other words, a mens rea component of fraud to ensure that it is not used to punish First Amendment speech. Constitutionally, the core of a fraud action "is particular representations made with intent to mislead." *Id.* at 621. In the absence of such protections, fraud laws can become tools for political prosecutions that set aside the First Amendment and this case is Exhibit A. In short, state law has given the Attorney General a potent tool she can and did use against a political opponent, regardless of harm or intent.

D. The Egregious Penalty Imposed on President Trump Further Demonstrates the First Amendment Retaliation in This Case.

Finally, the First Amendment problems in this case were exacerbated by the unparalleled and unprecedented disgorgement judgment here of over 350 million dollars. A judge's discretion to impose fines must "be judicially exercised; and there may be cases in which a punishment, though not beyond any limit fixed by statute, is

nevertheless so clearly excessive as to be erroneous in law." Thomas M. Cooley, *A Treatise on Constitutional Limitations* 402 (5th Ed. 1883). Ever since the Magna Carta, the law has recognized that punishment must properly suit the offense. *Id.* at 403. This obligation does not merely apply in criminal cases; the Supreme Court has made clear that it applies in civil cases as well. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

The Court's analysis applies likewise here: "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572. In *Gore*, an excessive punitive damages award was attempting to alter BMW's nationwide policy. By attempting such an award, "Alabama would be infringing on the policy choices of other States. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages," must be properly and constitutionally circumscribed. *Id.* The Constitution imposes substantive limits "beyond which penalties may not go." *Seaboard Air Line Ry. Co. v. Seegers*, 207 U.S. 73, 78 (1907).

Due process requires that "[w]hile each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation." *BMW of N. Am., Inc.*, 517 U.S. at 585; *see also id.* at 587 (Breyer, J., concurring) ("This constitutional concern, itself

harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion"). The reason is that "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive 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." *Id.* at 574.

The doctrine that penalties must not be excessive originates in Due Process. But the excessive, unprecedented penalty in this case further exacerbates the First Amendment concerns. A politicized proceeding is dangerous at any time, but that danger is particularly egregious where, as here, the penalty imposed as a result of that proceeding is unfathomably extreme. As a result of a transparently political proceeding, an unprecedented fine has been imposed on the Attorney General's political opponent, a fine that could not have been reasonably foreseen. The imposition of such a fine further illustrates that the Attorney General has wielded her power selectively to punish a political opponent for political speech, in violation of the fundamental rights of the First Amendment.

CONCLUSION

For the reasons stated above, this Court should reverse the trial court's judgment.

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Respectfully submitted,

/s/ Alexander Lonstein
ALEXANDER LONSTEIN
Law Offices of Alexander Lonstein
[redacted]

/s/ Jay Alan Sekulow
JAY ALAN SEKULOW
Counsel Of Record
JORDAN A. SEKULOW
STUART J. ROTH
ANDREW J. EKONOMOU
WALTER M. WEBER
BENJAMIN P. SISNEY
NATHAN J. MOELKER
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Respectfully submitted,

/s/ Jay Alan Sekulow

JAY ALAN SEKULOW
Counsel Of Record
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
Attorney for Amicus Curiae

PROOF OF SERVICE

The foregoing document has been e-filed and, pursuant to Rule 1245.7(B), the foregoing document was served electronically on all counsel of record.

Dated: July 23, 2024

Respectfully submitted,

/s/ Jay Alan Sekulow
JAY ALAN SEKULOW
Counsel of Record
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
Attorney for Amicus Curiae