

Case No. 2023-04925

**New York Supreme Court
Appellate Division – First Department**

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

Plaintiff-Respondent,

-against-

DONALD J. TRUMP, ET AL.,

Defendants-Appellants.

New York County Clerk's Index No. 452564/2022

**NOTICE OF MOTION OF SOUTH CAROLINA ATTORNEY GENERAL
ON BEHALF OF SOUTH CAROLINA, ALABAMA, ALASKA, FLORIDA,
IOWA, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, NORTH
DAKOTA, OHIO, OKLAHOMA, SOUTH DAKOTA, UTAH, AND WEST
VIRGINIA AS AMICI CURIAE FOR LEAVE TO FILE AN AMICUS
CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLANT
DONALD J. TRUMP**

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PLEASE TAKE NOTICE, that upon the annexed affirmation of Joseph D. Spate, Esq., dated July 26, 2024, and the accompanying proposed brief of *amici curiae*, the Attorney General of the State of South Carolina, by their attorney, Joseph D. Spate, Esq., will move this Court at the Supreme Court, Appellate Division, First Department, 27 Madison Avenue, New York, New York 10010, on August 5, 2024 at 10:00 a.m. or as soon thereafter as counsel may be heard, for an order permitting the proposed *amici* to serve and file a brief as *amici curiae* in support of Defendant-Appellant Donald J. Trump. This motion is filed pursuant to CPLR § 2214 and 22 NYCRR §§ 1250.4 and 600.4.

A copy of the affirmation of Joseph D. Spate, Esq. in support of this motion is annexed hereto as Exhibit A and the proposed *Amicus Curiae* Brief in Support of Defendant-Appellant Donald J. Trump is annexed hereto as Exhibit B.

Dated: July 26, 2024

Respectfully submitted,

s/ Andrew D. Cherkasky
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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 26, 2024

Respectfully submitted,

s/ Joseph D. Spate
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**AFFIRMATION OF JOSEPH D. SPATE, ESQ. IN SUPPORT OF
MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF**

JOSEPH D. SPATE, an attorney admitted to practice before this Court *pro hac vice*, affirms the following under penalties of perjury pursuant to CPLR § 2106:

1. I am the Assistant Deputy Solicitor General for the South Carolina Attorney General's Office. I submit this affirmation in support of Motion of the South Carolina Attorney General on Behalf of South Carolina, Alabama, Alaska, Florida, Iowa, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio,

Oklahoma, South Dakota, Utah, and West Virginia as *Amici Curiae* for Leave to File an *Amicus Curiae* Brief in Support of Defendant-Appellant Donald J. Trump.

2. *Amici curiae* respectfully request the Court’s permission to participate in this proceeding as *amici*.

3. *Amici curiae* do not request permission to participate in oral argument.

4. A copy of *amici curiae*’s proposed *amicus curiae* brief is attached hereto, pursuant to the Court’s rules.

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

6. This case involves questions of public importance for the Court’s consideration, namely, a civil judgment upon former President Donald J. Trump.

7. *Amici curiae* are sovereign states that seek to promote and protect the interests of their citizens.

8. *Amici curiae* seek to advise the Court that the Supreme Court’s “disgorgement of profits” judgment against President Donald J. Trump of approximately \$355 million amounts to an excessive fine under the Eighth Amendment’s Excessive Fines Clause and the Fourteenth Amendment’s Due Process Clause.

9. *Amici curiae* will present a unique perspective on the Eighth Amendment and Fourteenth Amendment issues in this case, specifically relating to the chilling effect the Supreme Court’s disgorgement judgment will have on business between citizens of *amici* states and the State of New York, as well as the threat this judgment poses to constitutional rights generally.

10. While President Trump’s opening brief did briefly touch on Eighth Amendment and Fourteenth Amendment issues, it did not approach those issues from the perspective of the sovereign states or the impact the judgment will have upon them.

11. Proposed *amici* are well-suited to advise the Court on the specific issues at play in this matter, specifically relating to the constitutionality of the “disgorgement of profits” award against President Trump.

12. Granting this motion for leave to file an amicus curiae brief would not impose an undue burden on the Court, as the proposed brief is within the 7,000-word limit and because it will aid the Court’s consideration of these important issues. Proposed *amici* seek only to submit a brief in support of Defendant-Appellant Donald J. Trump, which is attached as Exhibit B to the Notice of Motion.

WHEREFORE, for the reasons set forth herein, the South Carolina Attorney General on behalf of South Carolina, Alabama, Alaska, Florida, Iowa, Louisiana,

Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Utah, and West Virginia, respectfully requests an order granting leave to file an *Amicus Curiae* Brief in Support of Defendant-Appellant Donald J. Trump.

Dated: July 26, 2024

Respectfully submitted,

s/ Joseph D. Spate

JOSEPH D. SPATE

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INTERESTS OF AMICI CURIAE

South Carolina and other *amici* states share a deep concern for the interests of their citizens. And events in one state often impact the interests of citizens in another. That is why *amici* states are alarmed by the New York Supreme Court’s “disgorgement of profits” judgment against President Donald J. Trump of around \$355 million. The disgorgement order violated the Eighth Amendment’s Excessive Fines Clause and the Fourteenth Amendment’s Due Process Clause. And the impacts of that disgorgement will be felt far and wide. *Amici* states present a unique perspective on the Eighth and Fourteenth Amendment issues in this case and *amici* have multiple vested interests in providing that perspective to this Court.

1. The citizens of *amici* states conduct business in New York, primarily New York City, “a financial capital of the world, serving as an international clearinghouse and marketplace for a plethora of international transactions” *New York City, J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 227 (1975). And they need confidence that their customary business dealings in New York will not subject them to devastating fines. The Supreme Court’s disgorgement order will have a chilling effect on business conducted by citizens of *amici* states.

2. As sovereign states, *amici* have a special concern for the preservation of our constitutional form of government. And the Constitution only holds our union of states together in harmony if it is upheld by the courts. In this case, the Eighth

Amendment and the Fourteenth Amendments have been flouted by the Supreme Court. And that does damage to our Constitution. This Court can set the record straight and do right by the Constitution.

SUMMARY OF ARGUMENT

Attorney General of New York Letitia James sought monetary penalties and injunctive relief against former president (and current presidential candidate) Donald J. Trump, among others, primarily under New York’s civil fraud statute (Executive Law § 63(12)) in a complaint alleging seven causes of action. Order at 2, 5. New York alleged that President Trump submitted false financial statements to banks and insurance companies to obtain better rates on loans and insurance coverage. *Id.* at 2.

In an order dated September 26, 2023, the Supreme Court granted summary judgment in New York’s favor as to President Trump’s liability under the first cause of action. *Id.* at 5. And after a lengthy bench trial, the Supreme Court released its “Decision and Order After Non-Jury Trial” on February 16, 2024, finding President Trump liable for causes of action two, three, four, five, and seven. *Id.* at 91.

In its Order, the Supreme Court found that President Trump (jointly and severally, with multiple corporate entities) owes \$168,040,168 in “ill-gotten interest savings” from four loans between 2014 and 2022, (Order at 82), \$126,828,600 for “ill-gotten profits . . . netted from the sale of the Old Post Office,” (Order at 83), \$60

million of “windfall profits . . . attributable to selling Ferry Point to Bally’s,” (Order at 84), and prejudgment interest, (Order at 84-84).

All told, President Trump was ordered to pay \$354,868,768, plus prejudgment interest. Order at 91. Yet “it is undisputed that defendants have made all required [loan] payments on time” Order at 4.

Rather than address President Trump’s liability for the claims raised by New York, *amici* engage with the following question: does the penalty levied against President Trump comply with the Constitution? The answer: it does not. Even if President Trump violated the law as found by the Supreme Court, the penalty imposed is so disproportionate to the claimed offenses that it violates the Eighth Amendment’s Excessive Fines Clause and the Fourteenth Amendment’s Due Process Clause.

ARGUMENT

I. The Approximately \$355 Million Disgorgement Against President Trump Was an Excessive Fine Under the Eighth Amendment.

Even if President Trump committed “fraudulent acts” under Executive Law § 63(12), the penalty imposed on him far exceeds what is permissible under the Eighth Amendment.

United States v. Bajakajian, 524 U.S. 321 (1998) “established a two-step inquiry for determining whether a financial penalty is excessive under the Eighth Amendment.” *United States v. Viloski*, 814 F.3d 104, 108 (2d Cir. 2016).

Unsurprisingly, the Second Circuit has applied that analysis to disgorgement. Step one requires “determining whether the disgorgement was a ‘fine’ within the meaning of the Excessive Fines Clause.” *U.S. Sec. & Exch. Comm’n v. Metter*, 706 F. App’x 699, 703 (2d Cir. 2017) (quoting *United States v. Viloski*, 814 F.3d 104, 109 (2d Cir. 2016)). Step two considers “whether the disgorgement ordered here was ‘grossly disproportional.’”

Courts apply the Eighth Amendment Analysis to fines imposed under Executive Law § 63(12). *See, e.g., State v. United Parcel Serv., Inc.*, 253 F. Supp. 3d 583, 684 n.137 and 692. (S.D.N.Y. 2017), *aff’d*, 942 F.3d 554 (2d Cir. 2019) (“The Supreme Court instructs that the aggregate penalties imposed by the various statutory schemes are properly analyzed according to the Eighth Amendment proportionality standard.”); *Matter of People v. Orbital Publ’g Grp., Inc.*, 193 A.D.3d 661, 662 (2021) (declining to apply Eighth Amendment scrutiny to the restitution portion of an award but applying it to “[t]he penalty portion” of the award).

The disgorgement order against President Trump violates the Eighth Amendment.

a. The Disgorgement Was a Fine Under the Excessive Fines Clause.

New York law allows for the awarding of “restitution and damages” resulting from “repeated fraudulent or illegal acts or . . . persistent fraud or illegality in the

carrying on, conducting or transaction of business” Executive Law § 63(12). But rather than “restitution,” the Supreme Court ordered “monetary penalties” (Order at 2) since “it is undisputed that defendants have made all required [loan] payments on time” Order at 4.

Even after characterizing the disgorgement as “monetary penalties,” the Supreme Court wrongly identified the relief as equitable. Order at 82 (“Disgorgement is ‘the equitable remedy that deprives wrongdoers of their net profits from unlawful activity.’”) (quoting *Liu v Sec. & Exch. Comm’n*, 140 S Ct 1936, 1937 (2020)).

Disgorgement can be pursued as a penalty or an equitable remedy. *See Liu*, 591 U.S. at 85–86. But an aspect of equitable disgorgement that the Supreme Court omitted is “the countervailing equitable principle that the wrongdoer should not be punished by ‘pay[ing] more than a *fair compensation to the person wronged.*’” *Id.* at 80 (emphasis added) (internal citations omitted).

To be an equitable remedy, the disgorgement in question must be like restitution. *Id.* at 79-81. Because the disgorgement here was not “awarded for victims” or obtained as “a fair compensation to the person wronged,” *id.* at 75 and 80, it was legal, not equitable. *See* New York’s Memorandum in Opposition to Defendants’ Motion for Summary Judgment, at 74 (NYSCEF Do. No. 1277) (New York “seek[s] disgorgement and not restitution”). Indeed, the disgorgement

here is more properly understood in the context of “monetary penalties” awarded to address the generalized “harm that false statements inflict on the marketplace.” Order at 4. And New York’s pursuit of President Trump here goes far beyond typical State civil enforcement actions.

A “penalty” is a “punishment” when it is imposed “for an offense committed against the State” and “if it is sought ‘for the purpose of punishment, and to deter others from offending in like manner’—as opposed to compensating a victim for his loss.” *Kokesh v. S.E.C.*, 581 U.S. 455, 462 (2017) (internal citations omitted). And “a modern statutory forfeiture is a ‘fine’ for Eighth Amendment purposes if it constitutes punishment even in part” *Bajakajian*, 524 U.S. at 331 n.6.

Under *Bajakajian* and its progeny, the disgorgement against President Trump was punitive. As the Supreme Court acknowledged, “[d]isgorgement is distinct from the remedy of restitution because it focuses on the gain to the wrongdoer *as opposed to the loss to the victim*. Thus, disgorgement aims to *deter wrongdoing* by preventing the wrongdoer from retaining ill-gotten gains from fraudulent conduct.” Order at 81 (citing *People v Ernst & Young, LLP*, 114 AD3d 569 (1st Dept 2014)) (emphasis added).

And according to the Court of Appeals, “under relevant New York law, penalties have consistently been distinguished from compensatory remedies, damages, and payments otherwise measured through the harm caused by

wrongdoing,” so that a “penalty” refers to “non-compensatory, purely punitive monetary sanctions.” *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 183 N.E.3d 443, 449–50 (2021). That Court explained that a disgorgement was held to be not punitive because it “served a compensatory goal.” *Id.* at 451.

Contrast that non-punitive disgorgement with the order here: New York did not ask for a non-punitive, compensatory disgorgement and the Supreme Court did not order it—there was no compensatory goal. The Supreme Court awarding a non-compensatory disgorgement rather than restitution reveals the punitive nature of the award. *Metter*, 706 F. App'x at 703 (Summary Order) (applying *Kokesh* to find “the disgorgement liability imposed in this matter was essentially punitive in nature and thus was a fine within the meaning of the Excessive Fines Clause of the Eighth Amendment.”).

Thus, the first step of the *Bajakajian* inquiry is satisfied.

b. The Fine was “Grossly Disproportional” to the Alleged “Ill-Gotten Gains.”

States often enforce civil penalties against bad actors, and often impose such penalties against bad actors with skeptical victims. But such enforcement should aim to make the victims whole. Thus, even when restitution is impossible, “[t]he touchstone of [this] constitutional inquiry . . . is the principle of proportionality: The amount of the [fine] must bear some relationship to the gravity of the offense that it

is designed to punish.” *Matter of Prince v. City of N.Y.*, 108 A.D.3d 114, 121 (2013) (quoting *Bajakajian*, 524 U.S. at 334).

Whether a penalty is “grossly disproportionate” to the alleged offense asks “a court [to] consider the seriousness of the offense, the severity of the harm caused and the potential harm had the defendant not been apprehended, the maximum fine to which the defendant could have been subject, and the defendant's economic circumstances.” *Prince*, 108 A.D.3d at 121 (quoting *Cnty. of Nassau v. Canavan*, 802 N.E.2d 616, 622 (2003)); *see also Metter*, 706 F. App'x at 703 (considering similar factors). Applying those factors, the disgorgement against President Trump was grossly disproportionate.

1. Seriousness of the Alleged Offense.

The first factor supports finding the penalty to be “grossly disproportionate,” as the fine imposed by the Supreme Court bears no proportionality to the acts alleged. *Metter*, 706 F. App'x at 703.

Even though the Supreme Court found President Trump liable for committing “fraudulent acts” under a civil fraud statute, it ordered no restitution to any alleged victims. Order at 4, 81. And no criminal fraud charges were brought against President Trump for those same alleged acts. U.S. NEWS AND WORLD REPORT, *Trump Trials: What to Know and Why They Matter*, Jul. 15, 2024, <https://tinyurl.com/4asaj2ej>. That is because the alleged victims made a lot of money

from their business relationships with President Trump and considered him a “whale” client. Trial Testimony of Rosemary Vroblic, Nov. 29, 2023, NYSCEF Doc. No. 1659 at 151; *see also* THE HILL, *Deutsche Bank saw Trump as ‘whale’ of a client, NY fraud trial documents show*, Nov. 29, 2023, <https://tinyurl.com/2va86h3r>. Yet despite all that evidence, the judge fined President Trump \$355 million for allegedly overstating the value of his properties to obtain more favorable rates on loans and insurance coverage. Order at 2, 91.

Even if President Trump somehow violated the law, such alleged acts are not analogous to other civil acts warranting imposing a \$355 million fine. That is especially true as the alleged reporting offense here is unrelated to an equitable unjust enrichment or restitution claim to help make victims whole.

For example, in *Matter of People v. Orbital Publishing Group*, this Court considered an appeal from an individual defendant who was found liable for violating Executive Law § 63(12) (among other statutes) and who argued her monetary judgment was an excessive fine under the Eighth Amendment. 193 A.D.3d at 662. There, the individual defendant “was at the heart of a years’-long scheme that deceptively wrested tens of millions of dollars from consumers across the country, including tens of thousands of New Yorkers.” *Id.* As a result, the Court found her Eighth Amendment argument unavailing. *Id.*

Consider another example. The Second Circuit found that a disgorgement order does not violate the Excessive Fines Clause in the context of an “illegal dump and pump scheme” that “ultimately flows from the pockets of investors.” *Metter*, 706 F. App’x at 703-04.

The Supreme Court of the United States has also written to guide courts on how to distinguish between appropriate equitable disgorgement and disgorgement as an inappropriate excessive fine. In *United States v. Bajakajian*, “the defendant was charged with transporting more than \$10,000 in currency and violating a reporting requirement when the defendant attempted to board a flight with \$357,144.” *State v. United Parcel Serv., Inc.*, 253 F. Supp. 3d 583, 691 (S.D.N.Y. 2017), (citing *Bajakajian*, 524 U.S. at 327), *aff’d*, 942 F.3d 554 (2d Cir. 2019)). And “the Supreme Court found that forfeiture of the entire \$357,144 would violate the Excessive Fines Clause because the defendant’s crime was solely a reporting offense and unrelated to any other illegal activities.” *Id.* (citing *Bajakajian*, 524 U.S. at 337). So too here.

President Trump’s case is far more like *Bajakajian* than the defendants in *Orbital Publishing Group* and *Metter* because President Trump was not found to have “wrested” money from consumers or engaged in a scheme to steal money from the “pockets of investors.” Instead, like in *Bajakajian*, finding a \$357,144 fine for a reporting offense to be excessive, President Trump was accused of a mere reporting

offense. And even if that alleged conduct were unlawful, it did not amount to wresting tens of millions of dollars from consumers or stealing money from the pockets of investors. Otherwise, restitution would have been in order. Instead, the court imposed on President Trump a staggering \$355 million fine, payable to the State. President Trump's alleged activity is easily distinguished from the restitutionary remedies contemplated by *Bajakajian*'s first factor

When considering "the seriousness of the alleged offense," *Prince*, 108 A.D.3d at 121, the fine imposed on President Trump is excessive. The reporting offense he is alleged to have committed is not the kind of activity that merits a fine of around \$355 million.

2. Severity of the Alleged Harm.

Bajakajian's second factor also weighs in President Trump's favor here. The alleged harm cited by the Supreme Court is a generalized "harm that false statements inflict on the marketplace." Order at 4. And even after admitting that "despite the false financial statements, it is undisputed that defendants have made all required payments on Time," the Supreme Court could only muster that "the next group of lenders to receive bogus statements might not be so lucky." *Id.* The lack of actual harm shows.

Consider again *Orbital Publishing Group*, where the respondents were ordered to pay "a sum totaling \$16,134,456." *Orbital Pub. Group, Inc.*, 2019 WL

6793640, at *1. That case related to “a years’-long scheme that deceptively wrested tens of millions of dollars from consumers across the country.” *Orbital Publ. Group, Inc.*, 193 A.D.3d 661. That is why this Court ruled that “[t]he total monetary judgment, while significant, is commensurate with the offense.” *Id.*

And *Metter* too is legally distinguishable. The court in *Metter* imposed a disgorgement totaling more than \$52 million. When considering the nature of the alleged harm caused by offending conduct, the court noted that “each dollar of ill-gotten benefit Metter and his associates extracted by means of the illegal pump-and-dump scheme detailed in the Complaint flowed ultimately from the pockets of investors.” *Metter*, 706 F. Appx 699 at 703. As a result, that factor weighed against a finding of gross disproportionality. *Id.* at 704.

Not so here. As in *Bajakajian*, President Trump’s alleged reporting offense “caused no loss to the public fisc,” *Bajakajian*, 524 U.S. at 339, and “it bears no articulable correlation to any injury suffered by the Government.” *Id.* at 340. Nor did the Supreme Court find that victims were harmed and in need of restitution. Order at 4. Not only is President Trump’s \$355 million judgment far higher than the approximately \$16 million award in *Orbital Publishing Group* or *Metter*’s \$52 million award, the \$355 million award does not correspond with any harm allegedly inflicted by President Trump.

Rather than harm, President Trump’s contractual arrangements benefitted those with whom he enjoyed professional business relationships. President Trump was a sought-after “whale” client. NYSCEF Doc. No. 1659, at 151; *see supra* THE HILL. And even if President Trump misstated his assets’ value to obtain favorable rates for financing and insurance, his entry into those financing and insurance agreements abundantly enriched the other parties to those agreements. *Id.* That is unlike other State civil enforcements that occasionally occur with victims that contend they were not defrauded. Here, the alleged victims made significant profits.

Moreover, “[t]estimony from experts as well as representatives of the actual banks and insurance underwriters who executed the financial transactions with the Defendants that are at issue in this case establishes that the banks and insurance companies did not consider the [Statements of Financial Condition] and the estimates they contained to be material to their decisions to make certain loans or underwrite particular policies.” Defendants’ Memorandum in Support of Motion for Summary Judgment, at 63 (NYSCEF Doc. No. 835). Thus, unlike in other cases, the alleged misstatements were not relied on by the so-called victims. And “it is undisputed that [President Trump] made all required [loan] payments on time.” Order at 4. The absence of actual harm to other businesses reveals how grossly disproportionate the disgorgement of around \$355 million was.

3. Relation of the Fine to the Maximum Fine.

The third factor, considering “the maximum fine to which the defendant could have been subject,” *Prince*, 108 A.D.3d at 121, is neutral here. That is, the third factor is “inapposite in light of the absence of any statutory maximum in the context of a disgorgement award.” *Metter*, 706 F. App'x at 703. Because there is no statutory maximum against which to compare the disgorgement penalty, this factor does not weigh against President Trump. Instead, President Trump was fined approximately \$355 million for an alleged reporting offense.

Ultimately, then, the \$355 million fine is “grossly disproportional to the gravity of [President Trump’s alleged reporting] offense.” *Bajakajian*, 524 U.S. at 337. And there is real harm that others doing business in New York could face the same excessive treatment if this unconstitutional action by the Supreme Court is left unchecked. Because the disgorgement award against President Trump was an excessive fine under the Eighth Amendment, this Court should reverse the Supreme Court’s judgment of disgorgement.

II. The Approximately \$355 Million Fine Violated President Trump’s Due Process Rights Under the Fourteenth Amendment.

The Eighth Amendment is not the only Constitutional obstacle to the Supreme Court’s disproportional disgorgement fine against President Trump. The Fourteenth Amendment’s due process clause “prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” *State Farm Mut. Auto. Ins. Co. v. Campbell*,

538 U.S. 408, 416 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) (the Fourteenth Amendment “prohibits a State from imposing a ‘grossly excessive’ punishment on a tortfeasor.” (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993)). “The reason is that ‘[e]lementary 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.’” *Campbell*, 538 U.S. at 417 (quoting *Gore*, 517 U.S. at 574).

To determine whether a punitive award is “grossly excessive, courts consider ‘the degree of reprehensibility . . . ; the disparity between the harm or potential harm suffered . . . and [the] punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.’” *In re 91st St. Crane Collapse Litig.*, 154 A.D.3d 139, 158 (2017) (quoting *Gore*, 517 US at 575); *see also Campbell*, 538 U.S. at 418. A review of these factors reveals that the disgorgement judgment against President Trump bears no resemblance to other State enforcement actions. President Trump’s due process rights were violated here.

a. Degree of Reprehensibility.

“[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.” *Id.* at 419 (quoting *Gore*, 517 U.S. at 575). The “degree of reprehensibility” of a defendant’s

alleged conduct is determined “by considering whether: [1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.” *Id.* at 419 (quoting *Gore*, 517 U.S. at 576–77).

These reprehensibility factors are not met here. The alleged harm was not physical but economic. President Trump was not even alleged to have engaged in conduct that would evince a “reckless disregard of the health or safety of others.” The targets of the alleged conduct were not “financially vulnerable.” And the alleged harm was not the result of “intentional malice, trickery, or deceit,” as the sophisticated parties all performed their own due diligence.

b. Disparity Between the Alleged Harm and the Fine.

“[Courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff” *Campbell*, 538 U.S. at 426. Here, President Trump has been accused of a mere reporting offense, and fined \$355 million dollars. Especially considering the lack of actual victims, this fine far outstrips any alleged harm.

c. Difference Between the Fine and Penalties in Comparable Cases.

“The third guidepost in *Gore* is the disparity between the punitive damages award and the ‘civil penalties authorized or imposed in comparable cases,’ . . . [though] we have also looked to criminal penalties that could be imposed.” *Id.* at 428 (citing *Gore*, 517 U.S. at 575, 583). As in *Bajakajian*, President Trump has been accused of a reporting offense. And in *Bajakajian*, even a punitive forfeiture of around \$355,000 was deemed disproportional to the underlying reporting offense, where the maximum statutory criminal fine was \$5,000. *Bajakajian*, 524 U.S. at 326.

Here, President Trump’s fine is about 1,000 times greater than the one in *Bajakajian*. And the maximum statutory criminal fine for the relevant conduct would have been \$1,000. *See* N.Y. Penal Law § 80.05(1) (discussing sentences for misdemeanors); *see also* N.Y. Penal Law § 175.45 (identifying the crime of “issuing a false financial statement” as a class A misdemeanor). Even if the court were to consider the allegation that President Trump committed more than one instance of fraud, President Trump would have had to violate the criminal fraud statute around 355,000 times to reach the \$355 million figure awarded by the Court. The fine against President Trump is disproportional to penalties in comparable cases.

d. The Partisan Prosecution of President Trump in This Case Highlights the Violation of his Due Process Rights.

Another detail that distinguishes this case from typical State enforcement actions is the apparent motivation behind the genesis of this suit in the first place.

That President Trump’s due process rights were violated here becomes less surprising considering the political reasons that evidently gave rise to his prosecution.

The Attorney General of New York “ran for office . . . on the promise of taking down Mr. Trump.”¹ She has called our nation a “country a war,” and accused President Trump of being “at the eye of the storm,” going so far as to call then-President Trump an “illegitimate president” and “incompetent.”² She very openly stated that President Trump could be “indicted” and “should be charged,” and she promised to “join with other law enforcement and other attorneys general across this nation in removing [him].” *Id.* She promised that “the days of Donald Trump are coming to an end.” *Id.* Without question, “her outspokenness . . . has underscored the tension between an attorney general’s pledge of impartiality and the political benefits of attacking [President Trump].”³

This case has been the perfect vehicle for the Attorney General of New York to go after President Trump. Instead of bringing criminal charges, she brought a civil

¹ Allysia Finley, *Letitia James Sacrifices the Rule of Law to Get Trump*, Wall St. J. (Mar. 3, 2024), www.wsj.com/articles/letitia-james-sacrifices-the-rule-of-law-to-get-trump-dubious-fraud-suit-173963bc.

² NowThisImpact, *Why Letitia James Wants to Take on Trump as NY’s Attorney General*, YouTube (Sep. 28, 2018), www.youtube.com/watch?v=D1yj0NKSsuU.

³ Jesse McKinley, *After Letitia James Wins Big in Courtrooms, She Celebrates in Public*, N.Y. Times (Mar. 10, 2024), www.nytimes.com/2024/03/10/nyregion/letitia-james-trump-nra.html.

action under New York’s civil fraud statute, which vaguely prohibits “repeated fraudulent or illegal acts.” Executive Law § 63(12). Her theory: any time President Trump or his accountants valued an asset higher than New York’s expert, it was fraudulent.

The ensuing disgorgement order against President Trump caused so much concern amongst businesses that New York’s Governor issued a statement to reassure the public. A radio show host asked the governor if businesspeople should be worried, that if “they can do that to the former president, they can do that to anybody.”⁴ The Governor responded that businesspeople “have nothing to worry about, because they’re very different than Donald Trump.” *Id.* But the political targeting of President Trump does little to assuage concerns that ordinary businesspeople could be next.

The excessive nature of the Supreme Court’s fine against President Trump is exposed by the disparity between the actual alleged injury and the punishment levied, as well as the lack of statutory fines that parallel the award’s magnitude. And President Trump could not possibly have anticipated, nor did he receive fair notice, that he might face such a severe punishment. For this additional reason, this Court

⁴ Lauren Irwin, *Hochul tells NY businesses not to fear about Trump verdict: ‘Nothing to worry about’*, The Hill (Feb. 18, 2024), thehill.com/homenews/state-watch/4474774-hochul-tells-ny-businesses-not-to-fear-about-trump-verdict-nothing-to-worry-about/.

should reverse the Supreme Court’s judgment of disgorgement against President Trump.

CONCLUSION

This Court should reverse the Supreme Court’s judgment and vacate the unjust disgorgement fine imposed on President Trump.

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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.

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