NEW YORK SUPREME COURT
APPELLATE DIVISION — FIRST DEPARTMENT

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, SEVEN SPRINGS LLC, Defendants-Appellants, vs. PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Plaintiff-Respondent	Case Nos. 2023-04925 2024-01134 2024-01135

NOTICE OF MOTION AND AFFIRMATION OF RONALD A. BERUTTI IN SUPPORT OF JOB CREATORS NETWORK FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

PLEASE TAKE NOTICE that on Tuesday, September 3, 2024, Job Creators Network Foundation (JCNF), as *amicus curiae*, respectfully moves to file the attached brief in support of Defendants-Appellants in accordance with the Practice Rules of the Appellate Division, 22 NYCRR 1250.4(f). JCNF and its members have

a substantial interest in the just resolution of this proceeding, and JCNF's brief will aid in its expeditious, just, and lawful resolution.

Affirmation of Ronald A. Berutti

RONALD A. BERUTTI, being duly admitted to the Bar of this Court, hereby affirms the following under penalty of perjury:

1. Job Creators Network Foundation (JCNF) is a 501(c)(3) nonpartisan organization founded by entrepreneurs committed to educating employees of Main Street America about government policies that harm economic freedom. JCNF's Legal Action Fund defends against government overreach to ensure that America's free market system is not only protected but allowed to thrive. JCNF is committed to protecting Main Street and the 90 million Americans who depend on the success of small businesses.

2. Because of its dedication to economic freedom and to those who depend on small businesses for their economic well-being, JCNF has an interest in any matter that threatens the liberty or stability of our economy. New York has nearly half a million small businesses and over three million small business employees, so New York's vitality is especially important to JCNF.

3. Protecting New Yorkers and New York's environment of economic opportunity from the fallout of New York Attorney General Letitia James's

("NYAG") ill-considered prosecution of Donald Trump falls squarely within JCNF's core mission.

4. JCNF therefore offers the attached brief to explain how the decision on appeal will harm the New York economy by creating investment risk, undermining the rule of law, and driving business elsewhere.

The issues raised in the brief include:

- The decision on appeal creates economic uncertainty, which is dangerous for New York's economy.
- The decision on appeal is an unprecedented application of Executive Law § 63(12) that expands the law well beyond its intended scope.
- The decision on appeal creates an impossible standard of precision by which to judge the imprecise practice of asset valuation, thereby setting a precedent that would subject a wide swath of honest transactions to unjustified judicial scrutiny and punishment.
- The punitive fines imposed in the decision on appeal are grossly disproportionate to any measure of culpability and further exacerbate the risk of doing business in New York.
- The decision on appeal is unsound as a matter of policy, as it will harm New York's economy, stifle investment, cost jobs, and drive business out of New York.

5. JCNF is uniquely positioned to provide context, law, and arguments that might otherwise escape the Court's consideration. None of the parties, for example, are able to inform the Court's understanding of how the policy implications of the decision on appeal and the precedent it sets will affect the business and investment decisions of third parties. The Attorney General is not a businessperson and the Defendants, as parties, are too directly involved to offer an objective third-party perspective. JCNF, however, was founded by, is led by, is largely comprised of, and serves the interests of entrepreneurs and businesspeople. Educating the public and serving as the voice of Main Street as a defense to bad government policy is JCNF's core mission. When a legal precedent threatens to significantly impact how the economy is regulated, Main Street deserves a voice in the matter.

6. No party or party's counsel contributed to the content of the proposed brief, participated in its preparation, or contributed money that was intended to fund the preparation or submission of the brief. No person or entity other than JCNF and JCNF's counsel (including lawyers from Murray-Nolan Berutti LLC and America First Legal Foundation) contributed money that was intended to fund the preparation or submission of the brief.

Dated: New York New York
August 22, 2024

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BRIEF OF JOB CREATORS NETWORK FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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INTRODUCTION

Sometimes called the "Capitol of the World," New York City is truly iconic. The City encapsulates the American Dream. It's a city where culture thrives, fortunes are made and lost, and the entire world finds leadership and inspiration. New York is also a global hub of commerce, crucial to the American economy. "With the country's third largest GDP, New York is one of the United States' most formidable economic engines. When it suffers, the whole country underperforms."[1]

Small businesses are the heart of New York's economy. In fact, Ninety-eight percent of New York's businesses have fewer than 100 employees.[2] Employing over three million New Yorkers, these small businesses account for 39% of the employment in New York City.[3] It is no exaggeration to say that the people of New York depend on the vitality of New York's small business community.

Unfortunately, the politically motivated and ill-considered prosecution of Donald Trump and the Trump Organization threatens to drive business, investment, and people from this proud city.

New York is already suffering. The entire state—New York City especially—has endured a painful population decline since the COVID pandemic and

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[1] Kenan Fikri and Daniel Newman, *The Rise and Fall of an Empire (State)*, ECONOMIC INNOVATION GROUP (Dec. 15, 2023), https://perma.cc/H793-LAMC.
[2] *Annual Report on the State of Small Businesses 2023* at 3, EMPIRE STATE DEVELOPMENT (2023) (available at https://perma.cc/DAT6-NXVF).
[3] *Id.*

associated lockdowns. Since 2020, New York City has lost over half a million people, wiping out the nearly decade-long population growth New York enjoyed from 2010–2020.[4] In 2022, New York City experienced "the biggest [population] drop in the nation that year," shedding 101,984 residents.[5] The State as a whole has fared little better, with New Yorkers fleeing in droves.[6] As New York's population has declined, its economy has suffered. "No state has suffered as dramatic a reversal of economic fortune in recent years as New York."[7]

The unprecedented and unlawful targeting of Donald Trump and the Trump Organization by the New York State Attorney General and other State government officials saddles New York's economy with the heavy burden of the uncertainty, risk, and fear that flows from an authoritarian abuse of political power. Small businesses particularly depend on the rule of law to grow and thrive; when unprincipled partisans abuse and weaponize law enforcement and the judiciary to serve their friends and punish their enemies, business formation, investment, and employment are crippled. Amici encourages this court to protect this iconic city and state by recognizing

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[4] J. McMahon, *Slowdown in outflow, but no robust rebound in latest NY population estimates*, EMPIRE CENTER (Mar. 15, 2024), https://perma.cc/6ZHY-W5JQ.
[5] Suzanne Blake, *Millions of New Yorkers May Be Planning to Leave*, NEWSWEEK (Apr. 19, 2024), https://perma.cc/E6EG-V5DH. *See also* Alex Oliveira, *Ex-New Yorkers reveal why they joined thousands of others leaving Big Apple last year*, NEW YORK POST (Mar. 24, 2024), https://perma.cc/P9SE-Y7CZ.
[6] *Id.*
[7] Fikri & Newman, *supra* note 1.

this case for the harmful, arbitrary, and legally insufficient travesty that it is, and reversing the New York Supreme Court's decision.

INTEREST OF *AMICUS CURIAE*

Job Creators Network Foundation ("JCNF") is a 501(c)(3) nonpartisan organization founded by entrepreneurs committed to educating employees of Main Street America about government policies that harm economic freedom. JCNF's Legal Action Fund defends against government overreach to ensure that America's free market system is not only protected but allowed to thrive. JCNF is committed to protecting Main Street and the 90 million Americans who depend on the success of small businesses.

With nearly half a million small businesses and over three million small business employees, New York's vitality is of particular concern to JCNF. Protecting these New Yorkers from the fallout of New York Attorney General Letitia James's ("NYAG") ill-considered prosecution of Donald Trump is of the utmost importance.

ARGUMENT

NYAG's effort to prosecute former President Donald Trump, his children, his associates, and his company under Executive Law § 63(12) is deeply misguided because it creates uncertainty in the marketplace that undermines confidence in the rule

of law, discourages investment, and, ultimately, will harm the citizens of New York's interests.[8]

I. Uncertainty is dangerous for New York's economy.

The most dangerous aspect of this case for New York is that it calls the fairness and integrity of the State's law enforcement and judicial institutions into serious question. Politicized justice is no justice at all; small businesses depend on the rule of law, fairly applied, to grow and thrive. Economists and lawmakers have long understood that "[l]egal stability and predictability are a fundamental part of what people mean by the Rule of Law."[9] Cultivating predictability goes beyond a government's moral commitment to the rule of law; it is an economic necessity, because the risk associated with unpredictability constitutes a direct economic cost.[10] Indeed, the World Bank concluded, in its 1997 World Development Report, that a "government's credibility—the predictability of its rules and policies and the consistency with which they are applied—can be as important for attracting private investment as the content of the rule."[11] The Supreme Court of the United States similarly recognizes the economic value of predictability. *See, e.g.*, *Hertz Corp. v. Friend*, 559

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[8] Among many other reasons.

[9] Stefanie A. Lindquist & Frank C. Cross, *Stability, Predictability and the Rule of Law:* Stare Decisis *as Reciprocity Norm* (University of Texas School of Law, Working Paper 2010).

[10] *See, e.g.*, Anne E. Kleffner & Neil A. Doherty, *Costly Risk Bearing and the Supply of Catastrophic Insurance*, 63 J. OF RISK AND INS. 657, 659 ("Total risk lowers expectations about future cash flows by increasing the probability of suffering financial distress.").

[11] WORLD BANK, WORLD DEVELOPMENT REPORT1997: THE ROLE OF THE STATE IN A CHANGING WORLD (1997)

U.S. 77, 94 (2010) ("Predictability is valuable to corporations making business and investment decisions").

But by extending the scope of Executive Law § 63(12) beyond any prior understanding, the decision below undermines the rule of law, erodes public faith and confidence in the State's institutions of government, and creates massive uncertainty as to what the law of New York *is*. By increasing risk, the decision on appeal disincentivizes creating, growing, or even maintaining a small business in New York.

II. This politically motivated prosecution is unprecedented, unethical, and dangerous.

The decision below expands the power of courts and the Attorney General to second-guess business deals between sophisticated entities and to prosecute disfavored parties beyond any meaningful limitation while establishing a new standard that is likely to expose a vast swath of honest businesspeople to potential liability. It creates further risk for honest investors by inflicting penalties that are grossly disproportionate even if there had been some way to anticipate them.

a. This case is unprecedented and vastly expands the reach of Executive Law § 63(12).

The Attorney General has failed to identify any case remotely resembling this matter, and no rational businessperson could overlook the imposition of nearly $364 million (approximately $464 million after pre-judgment interest) worth of liability based on a novel interpretation of an already vague and expansive law.

The closest that the Attorney General has come to justifying this case is a citation to *People v. First American Corporation*, 18 N.Y.3d 173 (2011).[12] But beyond the superficial fact that both cases involved real estate appraisals in some way, the cases could hardly be more different.

This matter is about questioning the information provided in support of a deal between sophisticated parties, where the alleged "victims" had the ability and legal duty to perform due diligence (and did so). *First American Corporation* was about sophisticated parties conspiring to scam unsophisticated consumers into taking out home loans they couldn't afford. *Id.* at 176–77.

The statements of financial condition ("SFCs") at issue here were unreviewed and unaudited, subject to the "lowest level of scrutiny," either because Trump's counterparties were permitted to, legally required to, and did conduct their *own* estimates of Trump's worth, or because the SFCs were of minimal or no importance to the transactions at issue. *See People v. Trump*, No. 452564/2022, 2024 WL 733991 at *59 (N.Y. Sup. Ct. Feb. 16, 2024). The *First American* appraisals were supposed to be "audited for compliance" because they were central to the transactions and expected to be the only opportunity the parties would have to evaluate value. *First Am. Corp.*, 18 N.Y.3d at 176.

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[12] Plaintiff's Consolidated Memorandum of Law in Opposition to Certain Defendants' Motions to Dismiss at 29, *People v. Trump*, No. 452564/2022 (N.Y. Sup. Ct., Dec. 9, 2022).

It is unprecedented for the Attorney General to involve itself in punishing a party for allegedly incorrect valuations when such valuations were given to a sophisticated party that was able and obligated to—and did, in fact, conduct—its own due diligence, and where no party was damaged in any way. This novel expansion of Executive Law § 63(12) invites the Attorney General and the courts to pry into private transactions and make subjective judgments about the honesty with which parties conducted themselves, whether or not the parties were satisfied with the transactions. In other words, it allows political partisans to arbitrarily pick and choose whom to punish and whom to favor

b. The decision on appeal creates uncertainty by establishing a precedent that could include a vast swath of honest transactions.

Even worse, the Supreme Court's decision vacillates between refusing to offer guidance to honest businesspeople trying to stay on the right side of the law and offering guidance that could convert a vast range of good-faith valuation disagreements into "fraud" any time the Attorney General decides she wants to target someone over personal or political disagreements.

The Supreme Court acknowledges that valuing assets "is an art as well as a science," *Trump*, 2024 WL 733991 at *60. The value of an asset is not a firm, factual question, which is precisely why sophisticated entities are expected to perform due diligence before engaging in large transactions. But here, post-facto analysis by a politically motivated third party with no interest in the underlying transactions is

treated as an appropriate substitute for Deutsche Bank's own due diligence. Prudent investors must necessarily fear that their own political, personal, or professional rivalries could subject them to similar second-guessing by amateurs years after a transaction.

The decision on appeal illustrates the impossibility of insulating legitimate transactions from unfair scrutiny and massive penalties. As the Supreme Court noted, "[C]ourts have refused to define 'material' in a 'one size fits all' fashion." *Id.* The Supreme Court asserts that it sought guidance from experts at trial on how much of a "misstatement" would be "material," but "a firm definition could not be found." *Id.* Nonetheless, the Supreme Court "confidently declares that any number that is at least 10% off could be deemed 'material,' and any number that is at least 50% off would likely be deemed material. These numbers are probably conservative given that here, such deviations from truth represent hundreds of millions of dollars." *Id.*

In short, the decision on appeal establishes as precedent that a 10% disagreement on valuation "could" be enough to establish a "misstated" valuation as material and therefore "deceitful" or "fraudulent," and subject parties to massive financial liability, and a disagreement of 50% "would likely" be enough to subject parties to massive penalties. Since "[t]hese numbers are probably conservative" in the context of a large transaction, a smaller deviation might also be enough for fraud.

Yet the allegedly *reliable* valuations for Trump properties cited in the decision vary by far more than the amounts the Supreme Court "confidently declares" either "could" or "would likely" constitute fraud. For example, David McArdle estimated the value of Trump's Seven Springs property "ranged from $36 million-50 million before discounting to present value[.]" *Id.* at *11. That's a 38.9% range—on the high end for what *could* be fraud, close to "likely" fraud—within one supposedly reliable appraisal. Elsewhere, the Supreme Court relies on a $56.6 million valuation, which is "likely fraudulent" at over 57% above McArdle's low-end estimate. *Id.* at *14.

Similarly, a seven-mansion development site at Seven Springs was variously valued at $5.5 million, $14 million, and $23.5 million by three different appraisers from 2012–2015. *Id.* The Supreme Court compares the numbers to the Trump Organization's higher valuation to conclude that Trump's valuation was fraudulent but never explains whether any of the estimates *within* that 360% range should also be treated as fraudulent, nor why it treats them all as legitimate despite its own 50% standard for "likely" fraud, nor why the lower estimates should be presumed "factual" and the higher estimates fraudulent rather than the other way around.[13]

Estimated asset values are not statements of fact—which is why sophisticated parties conduct due diligence. The decision on appeal self-illustrates the absurdity

[13] Reasonable observers might suspect low estimates would not enjoy such deference if this case were, for example, about Trump using the lower estimates to contest property tax assessments.

of treating the value estimates in the SFCs as falsifiable factual statements: the Supreme Court "falsifies" them by comparing them to baseline value estimates that also do not pass the Supreme Court's test for "likely" fraud.

The uncertainty created by the decision on appeal undermines the rule of law in New York and may violate the U.S. Constitution's guarantees of Due Process in the Fifth and Fourteenth Amendments. *See, e.g.*, *Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982) ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.").

Constitutional and rule-of-law questions aside, the Supreme Court's vast expansion of Executive Law § 63(12) creates the risk that honest businesspeople engaged in good-faith dealings that are mutually profitable for all parties could find themselves ensnared in litigation, subject to massive fines, and tarred as fraudsters merely because they found themselves on NYAG's bad side.

c. The grossly disproportionate fines make it impossible for honest businesspeople to manage the risk of investing in New York.

The fines assessed against Defendants are vastly out of proportion to any alleged wrongdoing. Defendants adequately briefed the constitutional implications of the massive judgment the Supreme Court ordered them to pay, so JCNF will not

repeat those arguments here. Suffice it to say, JCNF agrees that the fines imposed here are unconstitutionally excessive under the Eighth and Fourteenth Amendments. *See, e.g.*, *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."). JCNF writes instead to emphasize the harmful impact such extreme penalties have on New York's business climate.

Businesses and investors must already consider legal risk and price it into their investment decisions. Fewer investors are willing to take a chance on New York's economic environment when risks increase. The judgment on appeal massively inflates the risk of doing business in New York by introducing a new risk of punishment to the marketplace: one levied on Defendants that is entirely out of proportion to any purported level of culpability.

Compare the judgment on appeal to recent high-culpability judgments. New York City Transit Authority was found 100% liable for dropping a 10-foot railroad tie onto a cyclist and paralyzing him, after a worker waved him through the construction site.[14] The cyclist was awarded $110 million, "believed to be the largest non-medical malpractice verdict in the history of New York," to compensate for the

[14] *$110 Million Verdict for Cyclist Paralyzed by Falling Railroad Tie During Subway Maintenance*, BLOCK O'TOOLE & MURPHY, https://perma.cc/UKH6-TV75 (last accessed Aug. 21, 2024); *see also* Susan DeSantis, *Jury Awards $110M to Bicyclist Whose Spinal Cord Was Severed by 10-Foot Railroad Tie*, NEW YORK LAW JOURNAL (Apr. 10, 2019), https://perma.cc/G7PE-JCQ2.

Transit Authority's extreme negligence costing him a lifetime in a wheelchair.[15] In Alabama, the family of a man killed when his doctors administered a fatal dose of Dilaudid to treat pain from a hand injury was awarded $10 million—"the largest wrongful death award in Alabama history."[16] One analysis of the top 230 wrongful death settlements in 2018 found an average settlement of $3.2 million, and a maximum settlement of $160 million.[17]

When extreme negligence causes death or paralysis, record-setting judgments top out at less than half of the Supreme Court's judgment against Defendants; average wrongful death settlements are less than 1%. No sober-minded analysis could conclude that paying your "victim" over $100 million in profits is 2–100 times more harmful than killing or paralyzing them, particularly where, as here, the "victims" had ample opportunity to protect themselves by conducting due diligence and making their own value judgments (and, in fact, did so).

The judgment on appeal inflicts penalties entirely disconnected from any concept of culpability or harm. "[I]t is undisputed that defendants have made all required payments on time," *Trump*, 2024 WL 733991 at *3, yet NYAG has proudly declared

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[15] *Id.*

[16] Brad Gunther, *AL Supreme Court upholds record $10 million wrongful death award against Springhill Memorial Hospital*, NBC 15 NEWS (Aug. 4, 2023), https://perma.cc/T2UA-9QZ2.

[17] *Top 100 Wrongful Death Settlements in the United States in 2018*, TOPVERDICT, https://perma.cc/XRL6-BYMX (last accessed July 26, 2024). The $160 million settlement was in Pennsylvania; the largest 2018 wrongful death settlement in New York was only $4.75 million. *Id.*

that she is ready to seize and liquidate Defendants' assets doing severe, possibly terminal, harm to the company to satisfy this judgment.[18]

Litigation risk is already difficult to manage.[19] This precedent threatens ruinous liability that investors cannot manage because it is disconnected from culpability or harm and tied instead to an application of Executive Law § 63(12) that establishes a standard by which the Supreme Court's own decision is "likely" fraudulent.

Any rational investor would look elsewhere, and any rational businessperson would consider building their business elsewhere or moving elsewhere if it is already established. A rational state would not push them to do so.

III. The precedent below saddles New York's economy with uncertainty, risk, and fear; it is contradictory to the public interest.

By expanding the scope of Executive Law § 63(12) and empowering the Attorney General to selectively persecute her personal and political opponents, the judgment below is already harming New York's interests. This is not hypothetical; Attorney General James has made it clear that she is committed to using novel legal interpretations to pursue opponents selectively, and investors are fleeing in response.

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[18] *See, e.g.*, Soo Rin Kim, Peter Charalambous & Lalee Ibssa, *Trump says he might be forced to sell assets at 'fire sale prices' to satisfy $464M bond in civil fraud case*, ABCNEWS (Mar. 19, 2024), https://perma.cc/S8YV-F2G2.

[19] *See, e.g.*, Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. Chi. L. Rev. 367, 371 (2009) ("This absence of a well-developed risk-transfer mechanism for litigation risk in particular may help explain why litigation risk is so daunting for American businesses and why lawyers and litigation are so unpopular.").

a. The Attorney General has made it clear that she intends to use every ounce of power at her disposal to pursue her opponents; the courts should not empower her to do so.

Attorney General James likes to proclaim that "no one is above the law,"[20] but many potential investors and New Yorkers are hearing a different message: "If they can do it to a former president, they can do it to you." James has built her legacy as Attorney General on politically motivated prosecutions and hostility towards business. The Supreme Court's unprecedented expansion of NYAG's power vastly expands the risk of James or one of her successors coming after you for some perceived slight or political disagreement.

This is not the first time James has targeted a political enemy for investigation. During the 2018 election, she called the National Rifle Association ("NRA") a "criminal enterprise" and a "terrorist organization" and vowed to make investigating the NRA her "top issue" if elected.[21] After the election, she kept her promise and filed suit against the organization.

James is also trying to wield her newly-expanded authority against disfavored food producers. Alleging that beef producer JBS USA Food Company has exaggerated their environmental efforts, James is now suing them, demanding similarly exorbitant fines be imposed for failing to adequately mitigate cows' greenhouse gas

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[20] *See, e.g.*, Kaitlin Lewis, *Letitia James' Warning to 'Powerful' People After Trump Trial*, NEWSWEEK (Dec. 16, 2023), https://perma.cc/ZX2Y-5XQN.

[21] Jon Campbell, *NY AG Letitia James called the NRA a 'terrorist organization.' Will it hurt her case?*, USA TODAY (Aug. 19, 2020), https://perma.cc/AJK7-FUG2.

emissions. *See* Complaint at 4, *People v. JBS USA Food Co.*, No. 450682/2024 (N.Y. Sup. Ct. Feb. 28, 2024) (demanding civil penalties in addition to "disgorgement of all profits and ill-gotten gains"). James unsuccessfully pursued her environmental agenda against Exxon Mobil based on alleged comments about Exxon's impact on climate change,[22] so she pivoted to investigating the energy industry writ large for alleged "price gouging."[23]

She's investigated AT&T for a cell service outage and "sued PepsiCo for selling food in single-use plastic packaging without warning consumers about 'the known and foreseeable risks that follow from the intended use and foreseeable misuse' — i.e., litter."[24] As the Wall Street Journal put it, "Ms. James's political business model is suing companies for doing business she doesn't like."[25]

In 2018, James campaigned in large part on her "get Trump" promises, calling him an "illegitimate president" and vowing to subject him and his business to costly investigations.[26] She has since claimed that the investigation at the heart of this case only began months later, in response to Michael Cohen's February 2019

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[22] *See, e.g.*, Amanda Luz Henning Santiago, *Letitia James loses the fight against Exxon Mobil*, CITY & STATE NEW YORK (Dec. 11, 2019), https://perma.cc/WDK3-HS2G.
[23] Matt Egan, *NY AG launches gas price gouging investigation into the oil industry*, CNN (Apr. 14, 2022), https://perma.cc/9PJD-LJK8.
[24] Editorial, *The Letitia James Anti-Business Business Model*, WALL STREET JOURNAL (Mar. 5, 2024), https://perma.cc/MCT5-Z2BR.
[25] *Id.*
[26] Sonia Moghe, *The New York AG's first 100 days of war against Trump*, CNN (Apr. 10, 2019), https://perma.cc/3S66-UVBH.

congressional testimony.[27] But it's no coincidence that she has found post-hoc excuses to investigate so many entities that she vowed to investigate during her campaign; perhaps she just subscribes to the Levrentiy Beria school of investigation: "Show me the man and I'll show you the crime."

While James has pursued the political targets she campaigned against, her ally, Maria Vullo, allegedly launched a pressure campaign to prevent banks and insurers from doing business with the NRA. The United States Supreme Court unanimously held that even if the allegations were true, such behavior violated NRA's First Amendment rights. *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175 (2024). Left unsaid, of course, is what could possibly be done if James took up the task and simply "investigated" banks and insurers that *did* do business with NRA. For that matter, what is to stop some future Republican attorney general from pursuing any banks or insurance companies doing business with Planned Parenthood?

The decision on appeal is all the more dangerous when combined with a political culture that seems to reward the dogged pursuit of political and personal opponents, and recent history shows that New York, unfortunately, is infested with just such a toxic political culture. By reversing, this court could reign in the attorney general's power and help to protect New Yorkers from political persecution.

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[27] *See, e.g.*, Plaintiff's Consolidated Memorandum of Law in Opposition to Certain Defendants' Motions to Dismiss at 5–6, *People v. Trump*, No. 452564/2022 (N.Y. Sup. Ct., Dec. 9, 2022).

b. Business is already fleeing New York.

The harm that the decision on appeal inflicts on New York's business environment is not hypothetical. Rational investors, cognizant of the risk this case creates, are already fleeing for safer business environments. Investor and Shark Tank star Kevin O'Leary has said he "would never invest in New York now" and says he has heard the same from fellow investors.[28] Grant Cardone of Cardone Capital has pulled his business out of New York; he manages $1.3 billion for his investors.[29] Even long-time Trump critic Jeb Bush has voiced concern: "If these rulings stand, the damage could cascade through the economy, creating fear of arbitrary enforcement against entrepreneurs who seek public office or raise their voices as citizens in a way that politicians dislike."[30]

As investors pull out of New York, the investment capital that small companies rely on to build and grow their businesses leaves with them. This means that even businesspeople not intimidated by NYAG's newfound power to persecute face a more daunting task in trying to secure the capital they need to build infrastructure, hire employees, and run their businesses—a strong incentive to seek out a safer environment.

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[28] Ariel Zilber, *'Shark Tank' star Kevin O'Leary says he won't invest in 'loser' New York after $355M judgment against Trump*, N.Y. POST (Feb. 20, 2024), https://perma.cc/5BXL-H4SB.
[29] Kristen Altus, *Billionaire CEO, real estate investor on impact of Trump verdict: 'Nobody wants to business' in NYC*, FOX BUSINESS (May 31, 2024), https://perma.cc/HJ3S-VXP6.
[30] Jeb Bush & Joe Lonsdale, *Elon Musk and Donald Trump Cases Imperil the Rule of Law*, WALL STREET JOURNAL (Feb. 21, 2024), https://perma.cc/4F4K-EHX3.

Meanwhile, New York Governor Kathy Hochul has felt the need to publicly speak out to assuage concern about the uncertainty this case creates.[31] Her reassurance is unpersuasive. She claims that "law-abiding and rule-following New Yorkers who are businesspeople have nothing to worry about."[32] But when a transaction between sophisticated businesspeople can be second-guessed by a politician and a Judge years after the fact and subjected to a standard that even the Supreme Court's "reliable" appraisers could not live up to, then no one can know whether they are a "law-abiding and rule-following New Yorker."

Governor Hochul insists that this is "an extraordinary, unusual circumstance,"[33] but the decision on appeal doesn't offer anything that would reassure a reasonable businessperson. To the extent the decision provides guidance on following the law, it then illustrates that even the honest appraisers used as the baseline against which the Supreme Court compared Trump's valuations could not securely claim the mantle of "rule-following New Yorker."

On the other hand, it's possible Governor Hochul merely tipped her hand, and this really is a unique circumstance—there is, after all, only one Donald J. Trump and there are many reasons to suspect this prosecution is more about the man than

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[31] *See, e.g.*, Edward Helmore, *New York governor seeks to quell business owners' fears after Trump ruling*, THE GUARDIAN (Feb. 18, 2024), https://perma.cc/4ZSN-C3ZR.
[32] *Id.*
[33] *Id.*

what he allegedly did. If so, this matter really is nothing more than unconstitutional persecution—a more than adequate reason to reverse the decision on appeal.

Regardless of whether this is a targeted persecution, it establishes a precedent that subjects good-faith transactions to post-hoc scrutiny and the possibility of ruinous civil liability. Risk is toxic for investment, and the Supreme Court's decision floods the New York business environment with unmanageable risk. The decision on appeal is a strong disincentive against investing in New York, and businesspeople are already fleeing. In defense of the rule of law and in the interest of preserving "the financial capital of the country and one of the financial capitals of the world," *Trump*, 2024 WL 733991 at *2, this court should reverse.

CONCLUSION

The judgment on appeal expands Executive Law 63(12) far beyond its intended reach and empowers politicians to persecute their opponents on flimsy pretexts. By imposing massive risk on New York business community, the Supreme Court's judgment also discourages honest businesspeople from building, growing, or maintaining businesses in New York. JCNF respectfully recommends that this Court reverse the decision on appeal to protect New York.

CERTIFICATE OF COMPLIANCE

This document complies with the length and format requirements of the Practice Rules of the Appellate Division 22 NYCRR 1250.8(f) because it contains 4,615 words, in 14-point type, double-spaced, with one-inch margins, on 8½ by 11-inch paper. I am relying on the word-count function in Microsoft Word in making this representation.

Dated: New York, New York
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AFFIRMATION OF SERVICE

RONALD A. BERUTTI, being duly admitted to the Bar of this Court, hereby affirms the following under penalty of perjury.

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