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Strategy Memorandum Against Unconstitutional Disgorgements

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The "Disgorgement" liability in the amount of $354,868,768 plus prejudgment interest imposed by Justice Engoron in *People of the State of New York, By Letitia James, Attorney General of the State of New York v. Donald J. Trump et al.,* 452564/2022 is actually an unconstitutional "Livelihood-Destroying" penalty masquerading as a judgment in "Equity"

Until 2017, the term "disgorgement" was always viewed as an equitable remedy by which courts could order a party to forfeit all ill-gotten profits arising out of a civil or criminal fraud or other scheme. Courts rarely considered disgorgement to be a form of punishment, and thus, disgorgement did not fall within the meaning of the Eighth Amendment to the United States Constitution, which prohibits excessive fines as punishment. This is a critical point because partisan New York State Supreme Court Justice Arthur F. Engoron went to great lengths to protect his ruling from appeal by calling the staggering nine-figure monetary penalty against President Trump "disgorgement" rather than calling it a "penalty" or "punishment." But, he made a key mistake that opened the door to an Eighth Amendment challenge by conceding that the purpose of this so-called "disgorgement" was not to make any "victims" whole (there were no victims), but rather, as he put it, to protect *"the integrity of the financial marketplace and, thus, the public as a whole."* These thirteen underlined words will prove crucial.

Perhaps Justice Engoron, like most state court judges, did not realize that in 2017, in *Kokesh v. S.E.C.*, 581 U.S. 455 (2017), the Supreme Court of the United States, for the first time, recognized that "disgorgement," when used to *penalize* or *punish* an individual labeled as a wrongdoer for the public good rather than to *compensate* any specific so-called "victims," does not operate as compensation, but rather "operates as a penalty." Only by first understanding, this subtle and recent shift in the Supreme Court's jurisprudence relating to disgorgement can the miscarriage of justice against President Trump be properly attacked under the Eighth Amendment. Also of note, *Kokesh* was cited favorably by the Supreme Court in *Liu v. S.E.C.*, 140 S. Ct. 1936 (2020).

Justice Engoron imposed disgorgement liability in the principal amount of $354,868,768 against President Trump personally, with prejudgment interest, bringing the total to approximately $454,000,000, together with an injunction banning President Trump from serving as an officer or director of any legal entity in New York and banning President Trump from applying for loans from any New York-registered financial institution. And, showboating New York State Attorney General Letitia James has already boasted that she will attempt to seize President Trump's properties immediately. *To be clear, no penalty of any kind should have been imposed, because there was no wrongdoing.* But, this is the exact kind of financial death sentence that the Supreme Court of the United States expressly forbids.

Indeed, this obscene penalty violates the Eighth Amendment to the United States Constitution, which provides: "*Excessive bail shall not be required, nor excessive fines imposed*, nor cruel and unusual punishments inflicted." U.S. Const., Amdt. 8 (emphasis added).

The Excessive Fines Clause is incorporated under the Fourteenth Amendment's Due Process Clause, and thus enforceable against the States, in this case New York. *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019). As well, the Excessive Fines Clause applies not just to "fines," but to other monetary punishments such as forfeiture, because the word "fine" was understood by the drafters of the Eighth Amendment to mean "a payment to a sovereign as punishment for some offense." Browning-Ferris Industries of *Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989).

Perhaps surprisingly, until 1998, the Supreme Court rarely interpreted, and had never actually applied, the Excessive Fines Clause. *United States v. Bajakajian*, 524 U.S. 321, 327 (1998). In *Bajakajian*, the Court held:

> ***The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.***
>
> ***Id. at 334.***

In *Bajakajian*, the defendant was charged with attempting to leave the United States without reporting, as required by federal law, that he was transporting more than $10,000 in currency (he had $357,144). *Id.* at 323. The Court held that forfeiture of the entire $357,144 amount, as sought by the Government, would violate the Excessive Fines Clause "because full forfeiture of [defendant's] currency would be grossly disproportional to the gravity of his offense." *Id.*

Bajakajian applies to civil and criminal cases. See, e.g., *U.S. Securities and Exchange Commission v. Metter*, 706 Fed. Appx. 699 (2d Cir. 2017). The four *Bajakajian* factors traditionally used to analyze proportionality are "(1) the essence of the crime of the defendant and its relation to other criminal activity, (2) whether the defendant fits into the class of persons for whom the statute was principally designed, (3) the maximum sentence and fine that could have been imposed, and (4) the nature of the harm caused by the defendant's conduct." *United States v. Viloski*, 814 F.3d 104, 110 (2d Cir. 2016) However, these four factors are not a rigid test. *Id.* "[O]ne additional factor is especially important *….the Excessive Fines Clause grew out of the English constitutional tradition, including Magna Carta, which required that a fine 'should not deprive a wrongdoer of his livelihood.' " Id.* (quoting Bajakajian, 524 U.S. at 335 (emphasis added).

And, the Supreme Court's reliance on the Magna Carta goes back even further than *Bajakajian*. As the Court noted in 1989, nine years before *Bajakajian*, Magna Carta's requirement that an "amercement"—a payment to the Crown as a penalty for some offense—"not be so large as to deprive [an offender] of his livelihood." *Browning-Ferris*, 492 U.S. at 269, 271.

This "hostility to *livelihood-destroying fines,*" *Viloski*, 814 F.3d at 111, became "deeply rooted" in Anglo-American constitutional theory and played a pivotal role in shaping the Eighth Amendment. *United States v. Levesque*, 546 F.3d 78, 84 (1st Cir. 2008) (emphasis added). Therefore, the question of whether disgorgement or forfeiture would deprive an individual of his livelihood (*i.e.*, his "future ability to earn a living," *Levesque*, 546 F.3d at 85) serves as a *de facto* fifth *Bajakajian* factor. *Viloski*, 814 F.3d at 111.

The bottom line is that under *Bajakajian* and *Browning-Ferris*, the Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.' "*Bajakajian*, 524 U.S. at 327-328; *Browning-Ferris*, 492 U.S. at 265; *see also United States v. One Parcel of Real Estate at 321 S.E. 9th Court, Pompano Beach, Fla.*, 914 F. Supp. 522, 525 (S.D. Fl. Dec. 20, 1995).

However, until *Kokesh* in 2017, the use of *"disgorgement"* against an individual could have been a potentially insurmountable obstacle to an Eighth Amendment challenge. Indeed, generally, until 2017, Courts held that disgorgement, which is a form of "[r]estitution measured by the defendant's wrongful gain," *Kokesh*, 581 U.S. at 459-460, "is not punishment" within the meaning of the Excessive Fines Clause. *See, e.g., S.E.C. v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994). This is because disgorgement was generally seen not as a penalty, but as an equitable remedy designed to restore the status quo that existed before an alleged wrong was committed. See generally *Kokesh*.

But, in *Kokesh*, the Supreme Court found that the S.E.C. frequently *did not return* the disgorged funds to the victims of securities frauds, and instead, the money simply ended up in the United States Treasury. *Kokesh*, 581 U.S. at 465. "When an individual is made to pay a non-compensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty." *Id.* (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) (distinguishing between restitution paid to an aggrieved party and penalties paid to the Government). In other words, when the penalty is paid to the government as a deterrent to certain allegedly unlawful activity—as in President Trump's case—the disgorgement may well be a punishment rather than a classic case of equitable disgorgement in which victims of fraud receive compensation. It would thus be subject to the Excessive Fines Clause. For that reason, the Supreme Court in *Kokesh* held that "SEC disgorgement thus bears all the hallmarks of a penalty: It is intended as a consequence of violating a public law, and it is intended to deter, not to compensate." *Kokesh*, 581 U.S. at 465. Most relevant to President Trump's case, the Court concluded:

> ***Because disgorgement orders 'go beyond compensation, are intended to punish, and label defendants wrongdoers" as a consequence of violating public laws, they represent a penalty . . . . Disgorgement, as it is applied in SEC enforcement proceedings, operates as a penalty.***
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> ***Id. (internal citations omitted); see also Gabelli v. SEC, 568 U.S. 442, 451-452 (2013) (same).***

Thus, a court—in this case, Justice Engoron—may not disguise a disproportionate punishment by simply calling it "disgorgement." And, likely, one of his goals in characterizing the penalty as "disgorgement" was to put his Decision & Order safely beyond the reach of the Eighth Amendment. But, in assessing such an outrageous amount ($354,868,768) as the penalty, failing to attach the disgorgement to any specific "victims" (and nor could he have, because there were no victims), and allowing the penalty to be paid to and collectable by the State of New York, Justice Engoron opened the door for his legal butchery to be attacked under the Excessive Fines Clause. The critical passage is Justice Engoron's concession that the goal of his Decision & Order was not disgorgement in the classical sense of making any specific "victims" whole, but rather, what he considers a broader public good:

> ***This Court is not constituted to judge morality; it is constituted to find facts and apply the law. In this particular case, in applying the law to the facts, the Court intends to protect the integrity of the financial marketplace and, thus, the public as a whole.***
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> *(**Decision & Order at p. 87**) (**emphasis added**).*

Normally, equity aims to restore the status quo after wrongdoing, not punish an alleged wrongdoer individually. *See* Dan B. Dobbs & Caprice L. Roberts, Law of Remedies § 4.3, at 397 (3d ed. 2018); *Tull v. United States*, 481 U.S. 412, 424 (1987) ("[A] court in equity . . . may not enforce civil penalties."); *Hecht v. Bowles*, 321 U.S. 321, 329-330 (1944) (explaining that equity is an "instrument for nice adjustment and reconciliation," not punishment). But, here, since Justice Engoron did not order the "disgorged" funds returned to any specific victim. Instead, they confirmed the *Orwellian* truth that we already knew to be the case—that the State of New York is simply intending to confiscate President Trump's legitimate and hard-earned profits for the "public good," it therefore follows that Justice Engoron's "disgorgement" is not disgorgement in the classical compensatory sense, but is, in reality, a penalty against President Trump masquerading as disgorgement. Indeed, here, just as in *Kokesh*, the relief sought by James's Office and awarded by Justice Engoron nowhere specifies that the disgorged funds will go directly (or even indirectly) to any alleged "victims"—since, of course, as previously stated, there are none. As James pointed out after the Decision, when discussing the seizure of assets: "We are prepared to make sure *that the judgment is paid to New Yorkers*, and yes, I look to 40 Wall Street each and every day." *See, e.g.*, Aaron Katersky and Peter Charalambous, "*Letitia James says she's prepared to seize Trump's buildings if he can't pay his $354M civil fine,*" ABC News (Feb. 20, 2024) (emphasis added).

This line between public and private interests is the demarcation point between legal and equitable relief and, thus, the line between compensation and punishment. Historically, the courts of equity in England and the early United States did not order restitution to vindicate the public interest, which is effectively what Justice Engoron has done with his order of "disgorgement" liability. Instead, a court of equity would order restitution to restore justice between the private parties to the actual dispute before the court.

See Tull, 481 U.S. at 424 ("Restitution is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.' ") (quoting *Porter*, 328 U.S. at 402). That is most definitely not what has occurred here, where Justice Engoron has severely and unjustly punished President Trump without identifying any specific harm to any specific entity or person, while the attention-seeking James, in turn, seeks to fill the coffers of New York State with the proceeds of that unjust punishment. Put another way: because the "disgorgement" here is punitive and not remedial in nature and is directed toward the purported "public good" rather than to a specific "victim," the Eighth Amendment applies to and paves the way for an attack against this unconstitutional and unprecedented penalty. In any event, there is good reason to question whether disgorgement is inherently "equitable" to begin with. As Justice Thomas observed in *Liu*:

> ***Disgorgement is not a traditional form of equitable relief. Rather, cases, legal dictionaries, and treatises establish that it is a 20th-century invention. As an initial matter, it is not even clear what "disgorgement" means. The majority frankly acknowledges its ' "protean character." ' The difficulty of defining this supposedly traditional remedy is the first sign that it is not a historically recognized equitable remedy . . . This remedy has no basis in historical practice.***
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> ***Liu, 140 S. Ct. at 1951 (Thomas, J., dissenting).***

In summary, the travesty that occurred in Justice Engoron's courtroom, reflected in his Decision & Order, was not "equity" but was instead a legal punishment with no historical basis. While he may call his ruling "disgorgement" rather than a "penalty" in an effort to protect it from an Eighth Amendment challenge, it is clear that after *Kokesh*, any notion that publicly-oriented "disgorgement" falls outside the scope of the Eighth Amendment, as interpreted in *Bajakajian*, is untenable. Publicly-oriented disgorgement *is* a form of punishment and thus falls squarely within the meaning of the Eighth Amendment.

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Edward A. Paltzik is the Director of Litigation for the National Constitutional Law Union. He earned a J.D. from Vanderbilt University Law School in 2006, where he won the Scholastic Excellence Award after having graduated with Distinction in All Subjects from Cornell University in 2003. He has represented hundreds of civil and criminal clients in a wide variety of high-stakes matters in both state and federal courts. Mr. Paltzik's practice encompasses 1st and 2nd Amendment Litigation seeking to vindicate these fundamental Constitutional rights, White-Collar Criminal Defense and White-Collar Investigations, Complex Commercial Litigation, Defamation Litigation, Employment Litigation, Healthcare Litigation, and Debt Collection Litigation. He is well known for his aggressive yet analytical approach to litigation, loyalty to his clients, and passion for causes that he believes in.

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