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NCLA Amicus Brief in NY Case Against Trump Explains Why NY’s Executive Law Violates Free Speech

People of the State of New York, By State Attorney General Letitia James, against Donald J. Trump, et al.

Washington, DC (August 2, 2024) – Today, the New Civil Liberties Alliance, together with its founder Professor Philip Hamburger, filed an *amicus curiae* [brief](#) in *New York v. Donald Trump*. NCLA and Prof. Hamburger ask the First Appellate Department of the New York Supreme Court to hold unconstitutional, on First Amendment grounds, a statute that New York Attorney General Letitia James is using to prosecute former President Trump for alleged fraud. Unlike common law fraud, New York Executive Law § 63.12 allows courts to punish defendants—as happened here—simply for making incorrect business statements, regardless of whether any inaccuracy was intentional (*i.e.*, no need to prove *mens rea*) or whether anyone was harmed as a result. NCLA urges the Court to correct this violation of free speech rights for the sake of all Americans.

NCLA is a nonpartisan, nonprofit organization that has successfully sued the Trump and Biden administrations, but we understand that all Americans—including controversial figures—must equally enjoy the freedom of speech. For that reason, NCLA had § 63.12 in our sights long before the current controversy emerged, as it has been abused before. NY’s Executive Law targets untruths, even immaterial untruths, that are made without bad intent, recklessness, or negligence and do not cause concrete harm to an identifiable third party. This standard runs roughshod over the First Amendment, which, as the Supreme Court has explicitly and repeatedly held, protects mere untruths that do not tangibly harm particular people.

Much more is at stake here than former President Trump’s allegedly inflated real estate valuations. Because § 63.12 allows prosecution for all business untruths, including unintentionally false statements, it discourages innocent people from taking the risk of speaking and thus chills truthful speech as well. Progress depends on our willingness to experiment in speech—to try out conclusions that may turn out to be incorrect—making § 63.12’s threat to innocent words later shown to be untrue profoundly dangerous. For this reason, the First Amendment has long protected false speech.

Regrettably, when former President Trump’s lawyers raised elements of this First Amendment argument to the trial court in this case, pointing out that § 63.12 permits punishments for false statements absent fraudulent intent or alleged damages, the court declared their arguments “frivolous,” and it imposed thousands of dollars in sanctions. Penalizing Trump’s attorneys for presenting what is not only a meritorious argument, but should be a winning one, compounded the constitutional problems with this case, violating the Fourteenth Amendment by denying the Defendants due process of law.

NCLA released the following statements:

“No doubt, truth in public matters is important. But ‘truth’ can only be arrived at through debate, experimentation with ideas, challenges to assertions made, and argument. ‘Truth’ is not imposed from on high. For this reason, it is important to protect all sorts of speech, even what turns out, on further examination, to be untrue. And while

the State has a right to punish untrue speech that causes injury (such as falsely shouting ‘fire’ in a crowded theater and causing a panic), the First Amendment does not allow it to punish untrue speech that causes no harm. The First Department should reverse the judgment below.”

— **Greg Dolin, Senior Litigation Counsel, NCLA**

“As NCLA has said in other contexts, the government is not and cannot be the arbiter of truth in deciding whether or not speech deserves protection. The First Amendment safeguards even bluster and puffery, and it does not permit New York’s Attorney General to single out harmless and immaterial false speech for special prosecution.”

— **Mark Chenoweth, President, NCLA**

For more information visit the *amicus* page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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