No. 23-939

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR FORMER GOVERNMENT OFFICIALS AND CONSTITUTIONAL LAWYERS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

Page(s)

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

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INTEREST OF AMICI CURIAE[1]

Amici are 13 former prosecutors, elected officials, other government officials, and constitutional lawyers who have collectively spent decades defending the Constitution, the interests of the American people, and the rule of law. As such, amici have an interest in the proper scope of executive power and the faithful enforcement of criminal laws enacted by Congress. Amici respectfully submit this brief to explain why the immunity defendant

[1] No counsel for a party authored this brief in whole or in part, and no person other than the amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

seeks in this case is inconsistent with our Constitution and would subvert the bedrock principle that no person is above the law. A complete listing of amici appears in the appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant, former President Trump, asks this Court to grant him immunity from federal criminal prosecution for all official acts he took while he occupied the Presidency. The courts below concluded that this extraordinary request has no basis in our constitutional text, structure, or history, and amici agree.

I. Defendant's position cannot be squared with the Constitution's text or history. He repeatedly invokes implied separation-of-powers principles, contending that the imposition of criminal liability on him would unduly impair the Executive Branch. But it is defendant's claimed immunity—not his prosecution—that would undermine those principles. The immunity he seeks would severely impair the ability of the current President, in whom all executive powers are vested, *see* U.S. Const. art. II, § 1, cl. 1, to take care that Congress's laws proscribing obstruction of federal elections are faithfully executed. And by asking the Judicial Branch to fashion a sweeping atextual immunity from whole cloth, he draws the Judiciary and the Executive into conflict.

II. Even if former Presidents had some limited immunity from criminal prosecution, that immunity could not conceivably cover the acts alleged here. *First*, many of the acts alleged in this indictment plainly constitute campaign activities that would not be protected even if there were some official-duty immunity from criminal prosecution. *Second*, defendant's alleged acts fall far outside any core presidential duty or function: many

plainly constitute electioneering, and in any event, the Constitution entrusts presidential elections to the States and the Congress, not to the President. U.S. Const. art. II, § 1, cls. 2, 3, 4. Indeed, the alleged criminal activity here raises a uniquely dangerous constitutional threat—the Chief Executive using his purported authority to violate the Executive Vesting Clause, U.S. Const. art. II, § 1, cl. 1, and remain in power beyond his legitimate term. Such activity threatens our constitutional structure at its core and, by its very nature, eviscerates one of the primary constitutional checks on presidential misconduct—rebuke by the people at the ballot box. *Finally*, defendant's argument that only his asserted categorical immunity can adequately protect future Presidents ignores that future Presidents already enjoy a host of protections, including the procedural safeguards inherent in criminal prosecutions and constitutional limitations on Congress's authority to criminalize the President's core Article II powers.

ARGUMENT

I. THE CONSTITUTION DOES NOT ENDOW FORMER PRESIDENTS WITH IMMUNITY FROM CRIMINAL PROSECUTION

Defendant's claimed immunity finds no support in the Constitution's text or historical practice. Nor can it remotely be squared with separation-of-powers principles made explicit in the Executive Vesting Clause and inherent in the structure of the Constitution; to the contrary, it subverts them.

A. No Constitutional Provision Immunizes Former Presidents From Criminal Responsibility

"[W]e start with the text of the Constitution." *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2203 (2021). "There is no 'Presidential Immunity' Clause" in

the Constitution. JA72. That omission is telling. "The Framers knew how to explicitly grant criminal immunity in the Constitution, as they did to legislators in the Speech or Debate Clause. … Yet they chose not to include a similar provision granting immunity to the President." JA47; *see also* U.S. Const. art. I, § 6, cl. 1 (providing that "for any Speech or Debate in either House," members of Congress "shall not be questioned in any other Place").

Far from barring the prosecution of former Presidents, the Constitution's text explicitly contemplates such proceedings. The Impeachment Judgment Clause provides that "[j]udgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. Const. art. I, § 3, cl. 7. The Clause preserves the Executive's ability to hold a former official "liable and subject to Indictment, Trial, Judgment and Punishment, according to Law," while limiting Congress's power of impeachment to removal and disqualification from certain positions. *Id.*

Defendant's alternate interpretation—that the Impeachment Judgment Clause permits prosecution of former Presidents *only* if they have first been impeached and convicted at trial by the Senate—has no basis in the text. The Clause speaks to "identifying the … penalties associated with impeachment," not limiting the criminal prosecution of former officeholders. JA75. And the error of defendant's reading is underscored by its sweeping and absurd consequences. It could effectively immunize former Presidents for criminal conduct that

occurs, or is discovered, too late for the impeachment process to run its course.

Even more fundamentally, the Impeachment Judgment Clause pertains to the Senate's authority over *all* impeachable officers—not only the President, but also the "Vice President and all civil Officers of the United States." U.S. Const. art. II, § 4. Under defendant's interpretation, the Executive would lack power to prosecute all current and former civil officers for acts taken in office unless Congress first impeached and convicted them. That would permit countless officials to evade criminal liability, including when the charges do not fit into the class of crimes that qualify for impeachment, and potentially when officials' crimes are discovered only after they leave office.

Such an outcome would also contradict decades of practice in which the Executive Branch has prosecuted, and the Judicial Branch has convicted, civil officers for crimes committed while in office—regardless of whether they were first convicted in an impeachment trial. *See, e.g.*, *United States* v. *Isaacs*, 493 F.2d 1124, 1144 (7th Cir. 1974) (per curiam), *overruled on other grounds as recognized by United States* v. *Gimbel*, 830 F.2d 621 (7th Cir. 1987) ("[W]e are convinced that a federal judge is subject to indictment and trial before impeachment."); *Imbler* v. *Pachtman*, 424 U.S. 409, 429 (1976) (stating that prosecutors would "fare no better" than judges, "[who] could be punished criminally"); *United States* v. *Claiborne*, 765 F.2d 784, 788, 805 (9th Cir. 1985) (affirming conviction of sitting district court judge convicted of "willfully underreport[ing] his taxable income").

Defendant attempts to reconcile his position by pointing to a 2000 Office of Legal Counsel ("OLC") opinion, *A Sitting President's Amenability to Indictment*

and Criminal Prosecution, which states that the Framers intended impeachment to mandatorily precede indictment "only as to the President." Pet.Br.20 (emphasis omitted) (quoting 24 Op. O.L.C. 222, 233 (2000)). Defendant relies on that statement to suggest that DOJ "admits" that only subordinate officers may face prosecution prior to impeachment. *Id.* That proposition collapses under the mildest scrutiny. The 2000 OLC opinion considered only "the indictment or criminal prosecution of a *sitting* President," and did not address whether a former President who was not impeached could be subjected to criminal prosecution. 24 Op. O.L.C. at 222 (emphasis added). So much is apparent from the title of that document alone. And the reasoning of that opinion does not translate to a former President. Rather, OLC's opinion depended on a sitting President's constitutional role as "'the nation's Chief Executive,'" and the Framers' understanding that the President "'would not be taken from duties that only he can perform unless and until … he is to be shorn of those duties by the Senate.'" *Id.* at 235-236. But a former President, unlike a sitting President, has already been "shorn" of his duties by operation of the Executive Vesting Clause, *infra* Part I.C.1, and no longer wields executive power that might be interfered with if he were still the President. Simply put, defendant is not the President, and the principles underlying the 2000 OLC opinion accordingly do not apply to him.

In sum, the text of the Constitution does not confer immunity upon former Presidents for conduct that violates the criminal laws of the United States and instead contemplates that a former President may be prosecuted for crimes committed in office.

B. History And Settled Practice Confirm That Former Presidents Are Not Immune From Federal Criminal Prosecution, Even For Official Acts

Historical practice confirms that former Presidents are not immune from federal criminal prosecution, even for official acts. While the "king of Great Britain [was] sacred and inviolable" and "amenable" to "no constitutional tribunal," the Framers ensured the President would be "liable to prosecution and punishment in the ordinary course of law." The Federalist No. 69 (Hamilton), http://tinyurl.com/y8m79547. As James Iredell stated at the North Carolina ratifying convention: "If [the President] commits any crime, he is punishable by the laws of his country[.]" 4 *Debates on the Constitution* 109 (J. Elliot ed. 1891). That was so because: "No man has an authority to injure another with impunity. No man is better than his fellow-citizens, nor can pretend to any superiority over the meanest man in the country. If the President does a single act by which the people are prejudiced, he is punishable himself[.]" *Id.*[2]

The Framers intended the Presidency to bear a closer "resemblance" to "the governor of New York," The Federalist No. 69 (Hamilton), than to a monarch with "royal prerogatives[,]" The Federalist No. 67 (Hamilton), http://tinyurl.com/4pth25h3. Former Governors, of course, are subject to federal criminal

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[2] *Cf. United States* v. *Lee*, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law. … All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.").

prosecution. *See* Barnhart, *As Andrew Cuomo Charged, These Other Governors Have Faced Criminal Charges*, Newsweek (Oct. 28, 2021), https://tinyurl.com/4s5x82p9. So too does the Constitution require that a former President be held responsible for his violations of criminal law.[3]

Past practice reflects this understanding. Former Presidents have recognized their and their predecessors' vulnerability to prosecution. President Clinton, for example, expressly admitted that he gave false testimony under oath as part of "a deal with the independent counsel … that ensure[d] he [would] avoid indictment"—a deal that would be unnecessary if he were immune from prosecution. Harris & Miller, *In a Deal, Clinton Avoids Indictment*, Wash. Post (Jan. 20, 2001), https://tinyurl.com/bdekva86. During his first term, President Grant was arrested for speeding his carriage along the streets of Washington, D.C. Prakash, *Prosecuting and Punishing Our Presidents*, 100 Tex. L. Rev. 55, 82-83 (2021). President Grant did not claim immunity, but submitted to arrest, posted (and later forfeited) collateral for a court appearance, and "signaled a welcome willingness to honor a familiar principle: every American is equal before the law." *Id.* at 83.

Historical practice also recognizes that former Presidents can be criminally liable even for allegedly official acts. President Ford, for example, granted President Nixon a "full, free, and absolute pardon" for "all offenses against the United States" committed during his

[3] *Cf. Nixon* v. *Fitzgerald*, 457 U.S. 731, 773 (1982) (White, J., dissenting) ("The only conclusions that can be drawn from [the Framers'] debate are that the independence of the Executive was not understood to require a total lack of accountability to the other branches and that there was no general desire to insulate the President from the consequences of his improper acts.").

administration, and President Nixon accepted the pardon. *See President Gerald R. Ford's Proclamation 4311, Granting a Pardon to Richard Nixon*, Ford Presidential Library (Sept. 8, 1974), https://tinyurl.com/5c6xb3m9; *Statement by Former President Richard Nixon* 1, Ford Presidential Library (Sept. 8, 1974), https://tinyurl.com/5yuj8r8k. President Nixon attempted to wrap his wrongdoing in the mantle of official presidential investigatory action, just as defendant does here.[4] Nevertheless, Presidents Ford and Nixon recognized, by granting and accepting the pardon, that a pardon was necessary to shield the former President from criminal prosecution for allegedly official acts.[5]

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[4] *See, e.g.*, *Brief on behalf of the President of the United States: Hearings Before The Committee On The Judiciary, House of Representatives, 93rd Cong., 2d Sess. Pursuant to H. Res. 803*, at 68 (July 18, 1974) ("[T]he President conducted a personal investigation and, based on the results of this investigation and in coordination with the Department of Justice, took Presidential action and removed several key White House staff members from office. The President's action was a function of his constitutionally-directed power to see that the laws are 'faithfully executed' and was well within the wide discretion afforded him under the executive power doctrine."), https://tinyurl.com/yb9n9cxz; *cf. Transcript of David Frost's Interview with Richard Nixon*, Teaching American History (1977) (statement of former President Nixon) ("[W]hen the president does it … that means that it is not illegal."), https://tinyurl.com/3tepc92n.

[5] It is telling that the only Founding Era authority defendant can muster is dicta from *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)—dicta defendant mischaracterizes. Defendant repeatedly states that *Marbury* stands for the proposition that a "President's official acts 'can never be examinable by the courts'" (at 3, 9, 11, 14, 30, 47) (quoting *Marbury*, 5 U.S. (1 Cranch) at 166). But the quoted statement was not necessary to resolve the case, and moreover, the Court never said all "official acts" by a President cannot be examined. Rather the Court made only the noncontroversial assertion that the Constitution "invest[s]" the President "with certain

Indeed, defendant himself acknowledged during his second impeachment trial that a former President is subject to criminal prosecution for allegedly official acts. His counsel made clear that "no former officeholder is immune" from the criminal judicial process:

> The Constitution expressly provides in article I, section 3, clause 7 that a convicted party, following impeachment, "shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law" [after removal]. *Clearly, a former civil officer who is not impeached is subject to the same.*
>
> We have a judicial process in this country. *We have an investigative process in this country to which no former officeholder is immune. That is the process that should be running its course.* That is the process the bill of attainder [clause] tells us is the appropriate one for investigation, prosecution, and punishment, with all of the attributes of that branch. … [The Article III courts] provide that kind of appropriate adjudication. That is accountability.

167 Cong. Rec. S589, S607 (daily ed. Feb. 9, 2021) (emphases added); *see also id.* at S601 (statement of defendant's counsel) ("If my colleagues on this side of the Chamber actually think that President Trump committed a criminal offense … [a]fter he is out of office, you go and arrest him. So there is no opportunity where the

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important political powers in the exercise of which he is to use his own discretion," *id.* at 165-166, on which "the decision of the executive is conclusive." *Id.* at 166. As explained below (*see infra* Part II), defendant's actions charged in the indictment here are far from any executive prerogative entrusted to the President's discretion by the Constitution.

President of the United States can run rampant into January, the end of his term, and just go away scot-free. The Department of Justice does know what to do with such people.").

Just as importantly, Senators voting for acquittal at defendant's impeachment trial expressly relied on the continued availability of criminal prosecution for the President's wrongful actions. *See* 167 Cong. Rec. S735, S736 (statement of Sen. McConnell) (daily ed. Feb. 13, 2021) ("President Trump is still liable for everything he did while he was in office, as an ordinary citizen—unless the statute of limitations is run, still liable for everything he did while he was in office. He didn't get away with anything yet .... We have a criminal justice system in this country."); Press Release, U.S. Senator Thom Tillis, *Tillis Statement on Impeachment Trial* (Feb. 13, 2021), https://tinyurl.com/nh9jny72 ("An impeachment trial is not the best or only way to hold a former elected official accountable for their actions. The ultimate accountability is through our criminal justice system where political passions are checked and due process is constitutionally mandated. No president is above the law or immune from criminal prosecution, and that includes former President Trump."); Weiser, *Ohio Sen. Rob Portman votes to acquit Trump; Sen. Sherrod Brown votes to convict*, Cincinnati Enquirer (Feb. 13, 2021), https://tinyurl.com/uw8fcu2t (quoting Sen. Rob Portman: "the appropriate place to address former officials' conduct is the criminal justice system" and that "the Constitution makes clear that former presidents are subject to the criminal justice system. That is where the issues raised by the president's inexcusable actions and words must be addressed."). Those impeachment proceedings involved the same wrongdoing alleged in the indictment

here. H.R. Res. 24, 117th Cong. (2021) (Article of Impeachment).

In short, the immunity defendant seeks would break with settled practice and tradition. Defendant's arguments to the contrary are part of a legal shell game in which defendant asserts that the forum for addressing his wrongdoing is always somewhere else. The Court should reject the ruse.

C. Extending Criminal Immunity To Former Presidents Would Subvert The Separation Of Powers And Undermine The Public Interest

Defendant contends that structural separation-of-powers principles compel his immunity from criminal prosecution. Exactly the opposite is true: it is his claimed immunity, not his prosecution, that would subvert the separation of powers.

In *Nixon* v. *Fitzgerald*, the Supreme Court reasoned that any kind of presidential immunity must be "rooted in the separation of powers under the Constitution," since the text of the Constitution grants no such shield. 457 U.S. 731, 753 (1982) (quoting *United States* v. *Nixon*, 418 U.S. 683, 708 (1974)). But "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President." *Id.* at 753-754. Rather, whether a court should decline to exercise jurisdiction over the President requires a court to "balance [1] the constitutional weight of the interest to be served" by the exercise of jurisdiction "against [2] the dangers of intrusion on the authority and functions of the Executive Branch." *Id.* at 754.

Here, there is no need to balance the two factors set out in *Fitzgerald* against each other, as neither weighs in defendant's favor. Granting *former* Presidents

immunity from criminal prosecution would greatly "intru[de] on the authority and functions" of the *current* Executive Branch, in violation of the Take Care and Executive Vesting Clauses. *Fitzgerald*, 457 U.S. at 754. And there are few weightier constitutional interests than the public's interest in the enforcement of the federal criminal laws that protect our Constitution's electoral processes from abuse.

1. Granting former Presidents immunity would intrude on the Executive Branch's authority

Defendant contends that the Judiciary—by exercising jurisdiction over him based on acts taken while he was President—intrudes on the Executive Branch's authority. Quite the opposite is true.

The Executive Branch, acting within the core of its constitutional responsibility to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, has decided, after years of investigation and deliberation, to pursue criminal charges against defendant. Defendant's claim to immunity thus poses an internal Executive Branch dispute between *two* Executives—one former, one current—not an interbranch conflict such as the one at issue in *Trump* v. *Mazars USA, LLP*, 140 S. Ct. 2019, 2033 (2020) (noting "the significant separation of powers issues raised by congressional subpoenas for the President's information").

And in the present dispute, there is not much of a contest. The Executive Vesting Clause vests the executive power in a single President—the current President. U.S. Const. art. II, § 1, cl. 1 ("The executive Power shall be vested in *a* President of the United States of America." (emphasis added)); *see also Trump* v. *Thompson*, 20 F.4th 10, 33 (D.C. Cir. 2021) ("Under our

Constitution, we have one President at a time."). As a former President claiming constitutional authority belonging to an office he no longer occupies—for the express purpose of undermining the Executive Branch's authority to prosecute him (indeed, for subverting the peaceful transition of power the Constitution dictates)—defendant's arguments lack any constitutional purchase. His claim to the mantle of protecting executive interests is particularly weak where, as here, the Department of Justice—the institution tasked with protecting the long-term interests of the Executive Branch—is the authority bringing the suit and disclaiming the theory of immunity he espouses.

Exercising jurisdiction here, then, does not impair another Branch's prerogative; rather, it vindicates the current Executive's interest in enforcing the laws and the Judiciary's interest in the adjudication of an alleged criminal offense. *See Nixon*, 418 U.S. at 707 ("The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III.").

By contrast, defendant's claim to immunity is antithetical to and subversive of the separation of powers. Defendant's argument would intrude upon the Judicial Branch's constitutional power to "check" the Executive, even as defendant simultaneously seeks to wield the Judicial Branch to obstruct the Executive's prosecutorial prerogatives. But "'the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.'" *Clinton* v. *Jones*, 520 U.S. 681, 701 (1997). Indeed, the Supreme Court has made clear that it has "never held that the performance of the duties of judicial, legislative, or executive officers,

requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights," because "the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress.'" *O'Shea* v. *Littleton*, 414 U.S. 488, 503 (1974) (quoting *Gravel* v. *United States*, 408 U.S. 606, 627 (1972)). Similarly here, the judicial power should not be employed to subvert the authority of the Executive Branch as it seeks to enforce criminal statutes enacted by the Legislative Branch.

Defendant cites *Fitzgerald* to argue that his immunity is necessary to avoid chilling a President's capacity to "'deal fearlessly and impartially' with the duties of his office." *See* Pet.Br.26 (quoting *Fitzgerald*, 457 U.S. at 752). But *Fitzgerald* rejected only private civil suits against a former President. *Fitzgerald* underscored that jurisdiction would be "warranted" when, as here, such action is necessary "to vindicate the public interest in an ongoing *criminal* prosecution." 457 U.S. at 754 (emphasis added).[6]

Indeed, the possibility that the President might be "chilled" in his executive functions by threat of later criminal sanction is baked into the Constitution itself. The President is *always* at risk of impeachment for "high Crimes and Misdemeanors," and *always* at risk of criminal prosecution, since even under defendant's theory, prosecution may follow impeachment. *Fitzgerald*'s concern about the potential chilling effects of myriad civil suits is therefore simply inapposite in the criminal

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[6] *See also Fitzgerald*, 457 U.S. at 765 (White, J., dissenting) (rejecting as "completely unacceptable" any approach under which "Congress cannot provide a remedy against Presidential misconduct and the criminal laws of the United States are wholly inapplicable to the President").

context, where the constitutional design expressly contemplates that a President will perform his duties despite the threat—and perhaps perform those duties more faithfully *because of* the threat—of impeachment and/or conviction for criminal actions.

Finally, the policy concerns underlying *Fitzgerald* do not support its extension to the criminal context. *First*, the Judiciary's role in safeguarding the Executive's free rein to "'deal fearlessly … with' the duties of the office," 457 U.S. at 752, sits differently in the federal criminal context. The fact that federal criminal prosecution is brought by the Executive Branch diminishes the likelihood that improper intrusion will occur. The current Executive is, of course, "vitally concerned with and in the best position to assess the present and future needs of the Executive Branch." *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 449 (1977). The decision of the incumbent Executive to file criminal charges against a former President—particularly in light of the certainty that all Presidents will someday add "former" to their title and thus must concern themselves with the precedent they set—"detracts from the weight" of defendant's assertion that absolute immunity from federal criminal prosecution is necessary to protect the Presidency. *Id.*; *see id.* ("[T]he fact that neither President Ford nor President Carter supports appellant's claim detracts from the weight of his contention that the Act impermissibly intrudes into the executive function and the needs of the Executive Branch.").[7]

[7] *Cf. Thompson*, 20 F.4th at 32-33 ("A court would be hard-pressed under these circumstances to tell the President that he has miscalculated the interests of the United States … ."). Moreover, even if a court were inclined to question whether a current Executive's decisions regarding, for example, whether to waive executive privilege adequately protect the Executive Branch's long-term

Second, the risk of "intrusion" posed by private civil suits brought against a former President is markedly different from the risk posed by a former President's federal criminal prosecution. While the *Fitzgerald* Court expressed concern that a former President would be an "easily identifiable target" for "numerous suits" for civil liability, 457 U.S. at 753 & n.33, there is but a single Executive Branch empowered to bring federal criminal charges. Denying immunity in this context thus does not expose a former President to a multitude of suits possible in the civil context, but instead to the decision of a single, politically accountable branch of government. Subject to the Attorney General's oversight, officers of that single branch must adhere to professional obligations prohibiting frivolous or malicious prosecutions—an obligation so well recognized that prosecutors are presumed, "'absen[t] … clear evidence to the contrary'" to "'have properly discharged their official duties.'" *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996). Even when prosecutors issue an indictment, they are bound by yet another check: the required sign-off from a grand jury "prohibited from engaging in 'arbitrary fishing expeditions'" or acting "'out of malice or an intent to harass.'" *Trump* v. *Vance*, 140 S. Ct. 2412, 2428 (2020).[8]

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interests, *see Trump* v. *Thompson*, 142 S. Ct. 680 (2022) (Kavanaugh, J., respecting denial of application for stay), a court should be particularly loath to use the Article III judicial power to second-guess an incumbent Executive regarding a core Article II obligation that the Constitution assigns to him—*e.g.*, ensuring that the criminal laws are faithfully executed.

[8] Though amici's position here addresses only the question of immunity from federal prosecution, it is worth noting that state prosecutors are bound by similar ethical obligations and procedural constraints. *See, e.g.*, Model Rules of Prof'l Conduct R. 3.8 (Am. Bar

Third, criminal defendants enjoy robust procedural protections from the Judiciary not available to civil litigants, including the privilege against self-incrimination, U.S. Const. amend. V, the higher burden of proof placed upon the Government to establish criminal liability, *see, e.g.*, *United States* v. *O'Brien*, 560 U.S. 218, 224 (2010), and the heightened *mens rea* requirement for criminal liability, *see*, *e.g.*, *Ruan* v. *United States*, 142 S. Ct. 2370, 2376-2377 (2000). Those features alleviate the risk that a President will face judicial process for an action undertaken in good faith while occupying the office of the Presidency.

2. The public interest overwhelmingly outweighs any purported intrusion on the Executive Branch

On the other side of the scale, the public interest in the enforcement of federal criminal law far outweighs any perceived intrusion on the Executive Branch. "When judicial action is needed to serve broad public interests—as when the Court acts … to vindicate the public interest in an ongoing criminal prosecution—the exercise of jurisdiction has been held warranted." *Fitzgerald*, 457 U.S. at 754 (citations omitted). It is difficult to imagine a weightier public interest in the exercise of jurisdiction than in the cases where defendant's theory of immunity would apply: to charges that a former President took actions in his official capacity that violated criminal law—indeed that he acted to subvert the democratic transition of power the Constitution itself mandates.

Ass'n 2024) ("The prosecutor in a criminal case shall … refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.")

Even if the exercise of jurisdiction in this case posed some limited intrusion on the Executive Branch, *but see supra* Part I.C.1, the public's interest in judicial process to adjudicate intentional criminal abuses of executive power would be more than sufficient to overcome it. Affording former Presidents virtual impunity for even the most egregious misconduct would controvert a fundamental norm of our constitutional scheme: that "[n]o man in this country is so high that he is above the law." *United States* v. *Lee*, 106 U.S. 196, 220 (1882).

3. The separation of powers protects the President's proper constitutional role

Defendant's suggestion that "every future President will be forced to grapple with the prospect of possibly being criminally prosecuted after leaving office *every time* he or she makes a politically controversial decision," (at 29), ignores the substantial constraints on future prosecutions of former Presidents. The constitutional separation of powers and the procedural safeguards inherent in criminal prosecutions adequately protect the President's proper constitutional role without need for the invented immunity defendant proposes.

Any federal criminal prosecution of a former President must respect the constitutional limitations on Congress's power. Prosecuting a President for "tak[ing] measures incompatible with the expressed or implied will of Congress" may not infringe on "his own constitutional powers" that are "exclusive" and "conclusive." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637-638 (1952) (Jackson, J., concurring). Congress cannot criminalize what it may not regulate. For that reason, a criminal statute that made it a felony to recognize an ambassador from a disfavored country would violate the Constitution not because the President is immune,

but because Congress lacked the power to enact such a statute in the first place. *See* U.S. Const. art. II, § 2 cl. 2; *cf. Zivotofsky* v. *Kerry*, 576 U.S. 1, 28 (2015) ("[T]he power to recognize or decline to recognize a foreign state and its territorial bounds resides in the President alone."). Similarly, Congress could not make it a felony to pardon those convicted of a disfavored crime. *See* U.S. Const. art. II, § 2 cl. 1; *Schick* v. *Reed*, 419 U.S. 256, 266 (1974) (the pardon power "flows from the Constitution alone, not from any legislative enactments, and … cannot be modified, abridged, or diminished by the Congress").[9]

If a prosecution under a generally applicable criminal statute risks infringing a President's exclusive powers under Article II, the Court could, in an appropriate case, apply the canon of constitutional avoidance to avoid reading statutes as extending to a President in that context. *See, e.g.*, *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992) ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA."); Dellinger, *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 351 (1995) ("Dellinger Memo") (describing "clear statement rule" under which "statutes that do not expressly apply to the President must be construed as not applying to the President if such application would involve a possible conflict

[9] In addition to the limitations on federal criminal prosecutions that arise from the President's exclusive powers in Article II, separate limitations on state criminal prosecutions may arise from the Supremacy Clause. *See* U.S. Const., art. IV, cl. 2; *In re Neagle*, 135 U.S. 1 (1890). The Court need not address the scope of such limitations in this case.

with the President's constitutional prerogatives."); *Public Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989) (declining to read statute as applicable to the President where there was a "serious[]" risk of infringement "on the President's Article II power to nominate federal judges").

Contrary to defendant's assertion (at 37-40), however, there is no warrant to apply a clear statement rule here. This Court has never adopted a categorical rule that no statute can apply against the President or his official acts unless Congress has specifically identified the President in the text of the statute. As the Dellinger Memo explains, the basis of the clear statement rule is to avoid infringing on the President's exclusive constitutional prerogatives. Where, as here, no such exclusive presidential powers are implicated by the prosecution, the clear statement rule does not apply. The Court, for example, never applied such a rule in *United States* v. *Nixon*, 418 U.S. 683 (1974), or *Clinton* v. *Jones*, 520 U.S. 681 (1997), even though the Court held in those cases that a sitting President was subject to the ordinary operation of the federal rules of criminal and civil procedure without any express textual indication that those provisions applied to the President. *See, e.g.*, *Nixon*, 418 U.S. at 686 ("This litigation presents for review the denial of a motion … to quash a third-party subpoena duces tecum issued … pursuant to Fed. Rule Crim. Proc. 17 (c).").

The charges against defendant do not conflict with the President's constitutional prerogatives, and so the clear statement rule is no obstacle to prosecution here. Defendant faces prosecution under four statutes—conspiracy to defraud the United States, 18 U.S.C. § 371, conspiracy to obstruct an official proceeding, *id.* § 1512(k), obstruction of an official proceeding,

id. § 1512(c)(2), and conspiracy against the free exercise of others' constitutional rights to have their votes counted, 18 U.S.C. § 241—based on his scheme to overturn the results of the 2020 presidential election. Applying these statutes here poses no risk of infringement on the President's constitutionally enumerated authority, both because the Constitution provides the President with *no* authority regarding the conduct of presidential elections (*see infra* Part II) and because the Constitution certainly does not grant the President power to intentionally frustrate the counting of electoral votes or the constitutionally prescribed vesting of executive power in the duly elected President. Just as the Constitution "confers no power in the President to receive bribes," Dellinger Memo at 357 n.11, the Constitution grants the President no authority to frustrate foundational constitutional mandates. *See supra* Part I.C.3.

Denying defendant's request for absolute immunity would thus leave Presidents with not only the protections of Article II and the clear statement rule but also the host of substantive and procedural protections afforded to all criminal defendants discussed above. *See supra* Part I.C.1. Indeed, defendant himself has secured dismissal of several counts of an indictment in a separate criminal prosecution based on that court's conclusion that "the lack of detail concerning an essential legal element [was] … fatal"; the challenged counts "fail[ed] to allege sufficient detail regarding the nature of [the crimes'] commission"; and the charges "[did] not give the Defendants enough information to prepare their defenses intelligently." Order on Defendants' Special Demurrers, *Georgia* v. *Trump et al.*, No. 23-SC-1889477, at 7 (Ga. Super. Ct. Mar. 13, 2024).

Accordingly, far from "incapacitat[ing] every future President with *de facto* blackmail and extortion,"

Pet.Br.3, rejecting defendant's argument for "absolute Presidential immunity from criminal prosecution for official acts" (at 37) would leave former Presidents with powerful tools to protect against malicious or bad faith prosecutions that threaten the constitutional role of the Presidency.

II. Even If Former Presidents Had Some Limited Immunity Against Criminal Prosecution For Certain Official Acts, It Could Not Conceivably Reach The Acts Alleged Here

Even if one could hypothesize a circumstance in which immunity for a former President might be warranted, no tenable formulation of immunity could reach defendant's machinations alleged here. The indictment alleges that defendant in many instances acted as a *private* candidate for re-election. Even defendant's own theory provides no immunity over such activities. Further, defendant allegedly acted to thwart the peaceful transfer of power that the Constitution demands. Any immunity that would shield those acts would contravene a bedrock of the Constitution.

First, even if it could conceivably be proper to transplant *Fitzgerald*'s "outer perimeter" test from the private civil liability context to the federal criminal context, defendant's argument fails on its own terms. That is because many of the actions alleged in the indictment are ones defendant took in his private capacity as a candidate for re-election.

As the D.C. Circuit recently explained in a private civil damages suit arising out of the same series of events alleged here, a defendant cannot claim the shield of official-duty immunity for actions taken in his private capacity as a candidate for re-election. *Blassingame* v. *Trump*, 87 F.4th 1, 3-4 (D.C. Cir. 2023). Just as in

Blassingame, many of the allegations here pertain to defendant's role as a candidate seeking to retain his office, not as a President conducting official business.

The indictment alleges that defendant launched his conspiracy to subvert the legitimate results of the 2020 election shortly after election day. JA192-193 (¶13). Rebuffed by members of his campaign staff, defendant cobbled together a shadow campaign led by Co-Conspirator 1, who "would spearhead his efforts going forward to challenge the election results." *Id.* He was joined in those efforts by the other co-conspirators listed in the indictment who—with the exception of Co-Conspirator 4—were private individuals working to effectuate a second term in office for defendant—not official members of defendant's administration working on the business of running the country. *See* JA183-184 (¶8). By contrast, official members of defendant's administration repeatedly explained to him that his claims of election fraud were untrue and refused to engage in his scheme. *See* JA188-189 (¶11(a)-(e)).

Many of defendant's alleged actions in furtherance of the conspiracy relied directly on campaign resources. Most notably, the indictment alleges that defendant leaned heavily on campaign staff to organize fraudulent slates of electors to transmit false certificates to Congress. For example, after devising the plan, "the Defendant and Co-Conspirator 2 called the Chairwoman of the Republican National Committee to ensure that the [elector] plan was in motion," telling her that "it was important for the RNC to help the Defendant's Campaign gather electors in targeted states, and falsely represent[ing] to her that such electors' votes would be used only if ongoing litigation in one of the states changed the results in the Defendant's favor." JA210 (¶56); *see also, e.g.*, JA212-213 (¶¶61, 63-64). These activities were

"organized, promoted, and funded by campaign channels, personnel, and resources," and were accordingly unofficial in nature. *Blassingame*, 87 F.4th at 21.

Moreover, as the D.C. Circuit observed in *Blassingame*, even defendant acknowledged that his efforts to challenge the results of the election were unofficial acts taken in his private capacity. *See* 87 F.4th at 16-17. When defendant moved to intervene in this Court's consideration of *Texas* v. *Pennsylvania*, No. 22O155 (U.S. Dec. 9, 2020) ("Trump S. Ct. Mot. to Intervene"), "he specifically explained to the Supreme Court (and captioned his filing accordingly) that he sought to 'intervene in this matter in his personal capacity as a candidate for re-election to the office of President of the United States,'" so that he might "'protect his unique and substantial personal interests as a candidate for re-election to the Office of President.'" *Blassingame*, 87 F.4th at 16 (quoting Trump S. Ct. Mot. to Intervene 14, 24). The primary purpose of granting a President official-act immunity from civil liability—"assuring that the President is not 'unduly cautious in the discharge of his official duties'" simply "has no salience" where, as here, "the President acts—by his own admission—in an unofficial, private capacity." *Id.*

Nearly all of defendant's actions charged in the indictment are criminal actions that any presidential candidate—incumbent or not—could have engaged in. Candidate Biden, for example, could have tried to organize fake slates of electors from Alabama or Wyoming. To cloak the same activities undertaken by an incumbent President with immunity as an official act would build a substantial pro-incumbent bias into every Presidential election, allowing an incumbent to engage with impunity in all manner of election chicanery. *See Blassingame*, 87 F.4th at 18-19 ("President Trump's approach thus would

attach official-act immunity to the 'unofficial conduct of the individual who happens to be the President.' … The pro-incumbent imbalance would be especially stark if the former and current Presidents were to run against each other. … We see no basis for giving an incumbent President that kind of asymmetrical advantage when running against his predecessor.").

Second, even those acts that defendant argues were undertaken in his official capacity are so irreconcilable with the commands of the Constitution and legitimate executive functions that no viable formulation of immunity could support shielding them. Far from constituting an executive prerogative, those acts do not relate to *any* assigned presidential duty. Rather, the Constitution explicitly tasks the States with selecting presidential electors. *See* U.S. Const. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors … ."). It allocates to Congress the power to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes." *Id.* art. II, § 1, cl. 4. And it directs the President of the Senate, "in the Presence of the Senate and House of Representatives," to oversee the electoral count. *Id.* art. II, § 1, cl. 3. Notably absent is *any* contemplated role for the President, perhaps in recognition of a President's self-interest when seeking re-election. Defendant's alleged efforts to subvert the electoral process and interject fake electors to usurp the role of the electors duly appointed by the States is thus not a legitimate exercise of executive power at all, let alone a core executive function. To the contrary, those efforts represent a transgression of the separation of powers and a breach of our

republican form of government that would have outraged the Founders.[10]

Indeed, defendant's alleged scheme is a frontal assault on the Constitution's Executive Vesting Clause, which provides that "the executive Power shall be vested in a President of the United States of America," who "shall hold his Office during the Term of four Years." U.S. Const. art. II, § 1, cl. 1. The Twentieth Amendment reiterates that the President's term "*shall end* at noon on the 20th day of January …; and the term[] of [the] successor[] shall then begin." *Id.* amend. XX, § 1 (emphasis added). Accordingly, when a President's reelection efforts fail, the Constitution requires that the

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[10] Defendant's actions bear no similarity to the historical examples of Presidential actions (cited by defendant at 22-23) that did not result in criminal prosecution and that, according to defendant, show that criminal prosecution of Presidents is constitutionally impermissible. *First*, defendant cites no statute that would have criminalized any of the cited actions. *Second*, the cited examples involved quintessentially executive acts expressly reserved to the President by the Constitution (e.g., command of military actions, direction of immigration policy, or exercise of the pardon power). The one exception (at 22-23)—John Quincy Adams's purportedly criminal "corrupt bargain" to secure the Presidency via *quid pro quo* appointment of Henry Clay as Secretary of State—has no bearing on this case. Much of the conduct involved in that "corrupt bargain" was undertaken by Adams *before* Adams was elected President and cannot conceivably bear on presidential immunity. And Adams's appointment of Clay to the cabinet after becoming President comes much closer to the core of Article II power than anything defendant is charged with here. The example thus bears more similarity to a bribe-for-pardon scenario, in which the official act of the pardon may be beyond the power of Congress to criminalize, but the bribe itself remains subject to criminal prosecution, as "the Constitution confers no power in the President to receive bribes." Dellinger Memo at 357 n.11.

President be divested of executive power so it can be vested in his successor.

To allow a President who has failed to win re-election to leverage his existing power to *prevent* the constitutionally required vesting of executive power in his successor would endanger one of the most fundamental operations of the Constitution—the peaceful transfer of executive power at the end of a President's term. It also would eviscerate one of the primary constitutional checks against presidential misconduct—potential defeat at the ballot box. *See Fitzgerald*, 457 U.S. at 757 ("Other incentives to avoid misconduct may include a desire to earn reelection[.]"). Indeed, granting a former President the immunity defendant seeks here would create a perverse incentive for sitting Presidents to engage in misconduct in order to stay in power illegally. *See* Letter from Jefferson to Madison (Dec. 20, 1787), https://tinyurl.com/m339fsua (noting the incentive for a President, "[i]f once elected, and at a second or third election outvoted by one or two votes, … [to] pretend false votes, foul play, hold possession of the reins of government, be supported by the states voting for him[.]"). A President could override the electoral will of the nation and maintain control of the government with near impunity, knowing that a mere 34 allies in the Senate would immunize him from removal and any other punishment, and thereby allow him to remain in power indefinitely in defiance of any electoral results.

The constitutional transfer of power according to Article II is the ultimate guarantor of the rest of the Constitution, by ensuring a government of the people, by the people, for the people. Without such a guaranty—if a person or party can seize control of the government contrary to the results of the election mandated by Article II—the Constitution's other rights and protections

are no longer secure. This Court should reject any theory of presidential immunity that would endanger the operation of the Executive Vesting Clause, which has preserved the stability of our Nation for over 200 years.

Finally, there is an urgent national need for prompt and definitive refutation of defendant's dangerous proposition: that, even taking the acts alleged in the indictment as true, he is immune from prosecution. Defendant may or may not be guilty of these charged offenses. But with defendant seeking reelection, it is fundamental to the integrity of our democratic processes that the Nation have the answer.[11]

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[11] Defendant suggests (at 44) that if the Court does not dismiss the indictment, it should remand for discovery and factfinding to apply the doctrine of immunity to the facts of this case. No such remand is necessary because this case presents the purely legal question of whether the Constitution extends immunity from federal criminal prosecution to acts undertaken—whether official or not—while occupying the office of the Presidency. It simply does not matter, for purposes of determining the existence of the constitutional immunity defendant asserts, whether defendant's acts were official or unofficial. *E.g.*, *McCutcheon* v. *Federal Election Comm'n*, 572 U.S. 185, 203 n.4 (2014) (declining to remand for additional factfinding on question treated by parties as "a purely legal one"). Even if the existence of immunity hinged on the characterization of an action as "official"—*i.e.*, falling within a President's Article II powers—further factfinding is not required. There is no plausible argument that any such core Article II authority is involved in the acts alleged here.

CONCLUSION

The Court should promptly affirm the judgment below.

Respectfully submitted.

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APPENDIX

APPENDIX
TABLE OF CONTENTS

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