

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 OF AMICUS CURIAE  
LEADERSHIP NOW PROJECT  
IN SUPPORT OF RESPONDENT**

William E. Meyer  
COVINGTON & BURLING LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, DC 20001

P. Benjamin Duke  
*Counsel of Record*

Jordan B. Bakst  
Jesse Y. Chang  
Ryan A. Partelow  
COVINGTON & BURLING LLP  
The New York Times Bldg.  
620 Eighth Avenue  
New York, New York 10018  
pbduke@cov.com  
(212) 841-1000

*Counsel for Amicus Curiae*

---

---

**TABLE OF CONTENTS**

	Page
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	5
I.    Insulating a Former President From Prosecution for Alleged Crimes While in Office Would Undermine the Rule of Law on Which American Business Depends and Jeopardize the Stability and Predictability Essential to Sustained Economic Prosperity.....	5
II.   Petitioner’s Alleged Crimes Were Not Within the Scope of the President’s Duties and Responsibilities and Therefore Did Not Involve “Official Acts.”.....	13
III.  This Court Should Promptly Affirm the Court of Appeals’ Decision on the Specific Facts of This Case and Remand to the District Court for a Just and Speedy Trial.....	17
CONCLUSION .....	23

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Blassingame v. Trump</i> , 87 F.4th 1 (D.C. Cir. 2023) .....	15
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	22
<i>Burton v. United States</i> , 196 U.S. 283 (1905).....	21
<i>Dennis v Sparks</i> , 449 U.S. 24 (1980).....	18
<i>Gannett Co. v. DePasquale</i> , 443 U.S. 368 (1979).....	22
<i>Ginzburg v. Goldwater</i> , 396 U.S. 1049 (1970).....	6
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982).....	21
<i>Liverpool, New York &amp; Philadelphia Steamship Co. v. Commissioners of Emigration</i> , 113 U.S. 33 (1885).....	21
<i>McCulloch v. Maryland</i> , 17 U.S. 316 (1819).....	15
<i>Nixon v. Fitzgerald</i> , 457 U.S. 731 (1982).....	18, 19
<i>Trump v. Vance</i> , 140 S. Ct. 2412 (2020).....	3, 13
<i>Trump v. Vance</i> , 591 U.S. 786 (2020).....	21

<i>United States v. Lee</i> , 106 U.S. 196 (1882).....	3, 13
<i>United States v. Nixon</i> , 418 U.S. 683 .....	14, 17
<i>Youngstown Sheet &amp; Tube Co. v.</i> <i>Sawyer</i> , 343 U.S. 579 (1952).....	2, 13, 14

### **Other Authorities**

Alberto Alesina et al., <i>Political Instability and Economic Growth</i> , 1 J. Econ. Growth 189 (June 1996) .....	11
Anat R. Admati, <i>Democracy and Prosperity Require Uncorrupt-ed Governments</i> , Insights by Stanford Bus. (Feb. 14, 2020) .....	9
Ben S. Bernanke, <i>Irreversibility, Uncertainty, and Cy-clical Investment</i> , 98(1) Quarterly J. Econ. 85 (Feb. 1983).....	9
Bryan Kelly et al., <i>The Price of Political Uncertainty: Theory and Evidence from the Option Market</i> , Nat'l Bureau of Econ. Rsch., Working Paper No. 19812 (Jan. 2014) .....	9
Courtney Rickert McCaffrey, Ernst & Young, <i>How Political Risk Affects Five Areas at the Top of the C-Suite Agenda</i> (Oct. 29, 2020).....	9
The Federalist No. 6 (Alexander Hamilton) .....	20

The Federalist No. 51 (James Madison).....	20
John T. Cuddington, <i>Capital Flight: Estimates, Issues, and Explanations</i> , 58 Princeton Studies Int'l Fin. 11 (1986).....	10
John Locke, Second Treatise on Government, Ch. 7, § 92 .....	20
Layna Mosley, <i>The Financial and Economic Dangers of Democratic Backsliding</i> , STATES UNITED DEMOCRACY CENTER (July 2023),.....	12
Lubos Pastor & Pietro Veronesi, <i>Political Uncertainty and Risk Premia</i> , Nat'l Bureau of Econ. Rsch., Working Paper No. 17464 (Sept. 2011) .....	10
Mitch McConnell, Remarks on Impeachment (Feb. 13, 2021) .....	20
Oliver Jones & Courtney Ricker McCaffrey, Ernst & Young, <i>The CEO Imperative: Are you making political risk a strategic priority?</i> (May 13, 2021) .....	9
PAUL WASHINGTON ET AL., THE CONFERENCE BOARD, AVOID- ING THE TRAGEDY OF THE COMMONS: HOW TO IMPROVE THE POLITICAL ENVIRONMENT FOR US BUSINESS 8 (2023).....	11
PricewaterhouseCoopers, PwC's 25th Annual Global CEO Survey (Jan. 17, 2022) .....	10

Quan Vu Le & Paul J. Zak, <i>Political Risk and Capital Flight</i> , 25 J. Int'l Money & Fin. 308 (2006) .....	7, 10
Samer Matta et al., <i>The Economic Impact of Political Instability and Mass Civil Protest</i> , 34 Economics & Politics 253 (Mar. 2022) .....	6
Sanjai Bhagat, <i>Eco-nomic Growth, Income Inequality, and the Rule of Law</i> , Harv. Bus. L. Rev. (Nov. 18, 2020) .....	11
Sarah Repucci, <i>Democracy Is Good for Business</i> , FREEDOM HOUSE (Aug. 3, 2015) .....	6
Vivek Astvansh et al., <i>Research: When Geopolitical Risk Rises, Innovation Stalls</i> , Harv. Bus. Rev. (Mar. 3, 2022) .....	10
Washington's Farewell Address (1796), <i>reprinted in S. Doc. No. 106-21</i> (2000) .....	6
William A. Galston & Elaine Kamarck, <i>Is Democracy Failing and Putting Our Economic System at Risk?</i> , Brookings Inst. (Jan. 4, 2022) .....	9

**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

*Amicus* The Leadership Now Project (“*Amicus*” or “Leadership Now”) is a national membership organization of business leaders committed to ensuring that the United States has a strong democracy and economy.

Leadership Now offers its members an innovative model for sustained and strategic engagement to strengthen democracy at a state and national level. Leadership Now supports a set of core principles that include defending the rule of law, increasing competitiveness in the political system to improve the quality of governance, supporting civic participation, and planting seeds for longer-term national growth and prosperity. Preserving responsive, democratic government is critical to the American economy, central to the organization’s mission, and touches the lives of all Americans.

*Amicus* has a deep interest in the outcome of this case, in which an indicted former President claims absolute immunity from criminal prosecution for the crimes he allegedly committed in an attempt to subvert the presidential election process and to remain in power beyond his constitutional term. *Amicus* believes that the theory of presidential criminal immunity advanced by former President Donald J. Trump (“Petitioner”) would undermine the rule of law and shatter the guardrails of democratic institutions that

---

<sup>1</sup> Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part. No party or counsel for a party, or any other person, other than *amicus curiae*, made a monetary contribution intended to fund the preparation or submission of this brief.

preserve and sustain American business and economic prosperity. *Amicus's* submission is informed by the collective experience of its members as business leaders and their collective interest in preserving democratic norms and the rule of law.

### SUMMARY OF ARGUMENT

American business leaders depend upon the rule of law as the anchor of stability and predictability in our economy. The Founders of our republic established a government wherein sovereignty derives solely from the People, not from a monarch or dictator, and no one—including the President—is above the law. The American system of government built upon this bedrock principle has proven to be the greatest engine for economic innovation in human history. If criminal conduct by our highest officials goes unchecked and the rule of law is subverted, the conditions necessary to sustain the orderly free market that drives American prosperity and its economic competitiveness are destabilized. If the challenged conduct was allegedly committed by a former President while in office, this fundamental threat is exacerbated. In this context, it is existentially important to uphold as unshakeable the sacrosanct American principle of equality and accountability under law.

I. “[M]en have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring). As this Court has emphatically stated, our Constitution is founded upon the premise that “[n]o man in this country is so high that he is above the



law,” and “[n]o officer of the law may set that law at defiance with impunity.” *United States v. Lee*, 106 U.S. 196, 220 (1882). “That principle applies, of course, to a President.” *Trump v. Vance*, 140 S. Ct. 2412, 2432 (2020) (Kavanaugh, J., concurring).

This Court should reject Petitioner’s bid for criminal immunity from prosecution under the Special Counsel’s indictment (the “Indictment”). Failure to deny Petitioner’s claim and remand this case for trial would severely weaken the rule of law and cause grave harm to American business and the U.S. economy as a whole. Petitioner’s attempt to minimize the impact of his claim to absolute presidential immunity on the business environment and economic conditions cannot withstand scrutiny. A duly empaneled federal grand jury returned the Indictment accusing Petitioner of engaging in a criminal conspiracy to overturn the results of the 2020 presidential election and obstruct or prevent the peaceful transfer of executive power to the newly-elected President. No crime could more fundamentally endanger American democracy and the American economy than those alleged against Petitioner here.

Petitioner’s attempt to immunize himself against prosecution for such crimes constitutes an assault on the rule of law that threatens to jeopardize the enduring strength of the American business environment and seriously erode the underpinnings of our economy. It is well-established empirically that the rule of law goes hand-in-hand with political and economic stability. American economic strength and prosperity were built and depend upon confidence in the rule of law and the continuity of democratic governance through elections leading to peaceful and orderly

transfers of power. Without clearly established criminal penalties for a former President's attempt while in office to upend a national election and thwart the peaceful transfer of power, the rule-of-law norms that have long sustained American business investment and growth will erode, undermining the economy that has sustained America's success for so long.

II. Petitioner's claim of presidential immunity for the criminal conduct alleged in the Indictment is based on the premise that he is being prosecuted for his "official acts" while in office. That premise is demonstrably false: the crimes alleged in the Indictment are predicated upon knowing criminal acts well beyond the outermost scope of the President's official duties and responsibilities. As alleged in the Indictment, the conduct constituting Petitioner's crimes were not, and did not "involve," any "official acts." To the extent that the Court's formulation of the question presented for review suggests otherwise, that suggestion is legally unfounded, and this Court should reject it.

Even if some hypothetical concern might be raised against a categorical rejection of Petitioner's criminal immunity claim in all potential instances, this case presents no need or justification to define the outer boundary of presidential authority, let alone map its intricate limits. Neither the Constitution nor the Electoral Count Act assigns a sitting President any role in determining the results of a Presidential election or effectuating the transfer of power to a newly-elected President. No colorable doctrine of presidential criminal immunity under the Constitution could conceivably reach this case.

III. *Amicus* respectfully submits that, at a minimum, this Court should apply the fundamental doctrine of constitutional avoidance and swiftly reject Petitioner’s claim on the narrowest available grounds. The only ruling necessary to resolve this case is the narrow one correctly reached and decided by the Court of Appeals: when, as under the Indictment, “a former President has been indicted on federal criminal charges arising from his alleged conspiracy to overturn federal election results and unlawfully overstay his Presidential term,” J.A.33, that former President has no claim of immunity from prosecution or punishment for those alleged crimes. Given the paramount public importance of this case in the context of the 2024 presidential election, a swift decision by the Court on narrow grounds is essential to avoid further delay in this case.

The public has a right to know the substance of the Special Counsel’s evidence against Petitioner, and a pressing interest in the outcome of Petitioner’s trial in this case. *Amicus* respectfully submits that this Court should promptly reject Petitioner’s claim and remand this case for a just and speedy trial.

## ARGUMENT

### **I. Insulating a Former President From Prosecution for Alleged Crimes While in Office Would Undermine the Rule of Law on Which American Business Depends and Jeopardize the Stability and Predictability Essential to Sustained Economic Prosperity.**

The President’s importance as the bulwark of American democratic institutions and norms cannot

be understated. “In our times, the person who holds that high office has an almost unbounded power for good or evil.” *Ginzburg v. Goldwater*, 396 U.S. 1049, 1051 (1970) (Black, J., dissenting). As the President’s potential *impact* has increased, however, the importance of President George Washington’s farewell declaration has grown in the same proportion: “The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government.” Washington’s Farewell Address (1796), *reprinted in* S. Doc. No. 106-21, at 13 (2000). The individual citizen who temporarily holds the office of the Presidency is, and must be, personally answerable to the law. To suggest that President Washington really meant, “every individual—except the President,” is offensive to the fundamental American ideal of limited government under law.

It has long been established that the rule of law goes hand-in-hand with political and economic stability. *See, e.g.,* Samer Matta et al., *The Economic Impact of Political Instability and Mass Civil Protest*, 34 *Economics & Politics* 253 (Mar. 2022). Our economic system is animated by the widespread recognition that “[s]table, transparent governments built on respect for human rights and the rule of law tend to foster environments that are conducive to the establishment and unfettered operation of private enterprises.”<sup>2</sup> Economic development and sustained growth rely in large part on the government’s protection and support of businesses’ reliance interests—a guardianship that

---

<sup>2</sup> Sarah Repucci, *Democracy Is Good for Business*, FREEDOM HOUSE (Aug. 3, 2015), <https://perma.cc/97D8-TS27>.

runs the gamut from enforcing contracts to administering justice and punishing fraud.<sup>3</sup> For over 230 years, the American business community has relied upon our founding governmental principle that *no one* is above the law as the essential guarantor of business investments and expectations.

The unparalleled American economic prosperity fostered by this principle has resulted in immense benefits not only for business owners but also for the millions of people employed by them, and for consumers, investors, and other stakeholders in the economy. But America's economic prosperity and competitiveness, and other benefits fostered by the rule of law, can endure only when *all* political and economic actors, including the nation's highest government officials, are constrained by that rule of law and its prohibitions against criminal activity.

*Amicus* respectfully submits that the enormity and breadth of Petitioner's claim to absolute criminal immunity, and the frontal attack on the rule of law that it represents, should not be ignored or downplayed. To the contrary, as discussed further in parts II and III below, the alleged crimes in the Indictment stand well beyond the outermost limit of the President's duties and responsibilities under the Constitution and cannot be characterized as constituting or involving "official acts." The inescapable consequence of immunizing such crimes would be a lawless Executive unchecked by any effective means to limit or contain the President's power.

---

<sup>3</sup> See, e.g., Quan Vu Le & Paul J. Zak, Political Risk and Capital Flight, 25 J. Int'l Money & Fin. 308, 309 (2006).

Even Petitioner does not dispute that, under his theory, the sitting President could commit any crimes to his liking, with no potential sanction whatsoever, unless Congress first impeaches and removes him from office. Pet. Br. at 35–36. Incredibly, Petitioner asks this Court to credit the notion that “some level of Presidential malfeasance” without punishment is “inherent in the Constitution’s design,” *id.* at 36, and asserts—without citation or support of any kind—that the Founders thought that allowing for such malfeasance was “worth the risk.” *Id.* (asserting that the Founders otherwise would have “burn[ed] the Presidency itself to the ground”). *Id.* Petitioner cavalierly suggests that the President’s unsanctioned crimes under his proposed regime would be “marginal.” *Id.*

Petitioner’s attempt to trivialize the real-world consequences of his claim severely understates the impact on the economy of replacing accountability and consistency with uncertainty and instability. The negative economic impact of having a President personally unaccountable to our nation’s federal criminal laws—particularly those that safeguard the presidential election process and peaceful transfer of power to a new President—is significant, and would undermine the trust in our system that is the foundation of America’s economic competitiveness. It would threaten to corrode the basic framework upon which the American business community has come to rely. The resultant loss of confidence and weakening of basic democratic guardrails would undermine economic growth by dampening investment, discouraging innovation, and irrevocably altering the fundamental rule-of-law expectations that have created and sustained a robust and growing American economy.

Continued economic prosperity in the United States depends on stability and predictability. “The simple fact is that it is hard to plan and invest for the future in volatile, unstable circumstances.”<sup>4</sup> Unsurprisingly, scholars have found that businesses are less likely to engage in capital investment or borrowing when faced with uncertainty.<sup>5</sup> A key component of the uncertainty that businesses face is political risk—with 94 percent of surveyed executives reporting that they felt the impact of unexpected political risks in the last year.<sup>6</sup> As political risk increases, businesses must spend more to acquire capital, making all forms of investment more expensive.<sup>7</sup> Political instability upends businesses’ settled expectations, to the detriment of businesses’ customers, workforce, investors, and their overall financial performance.<sup>8</sup>

---

<sup>4</sup> William A. Galston & Elaine Kamarck, *Is Democracy Failing and Putting Our Economic System at Risk?*, Brookings Inst. (Jan. 4, 2022), <https://perma.cc/EF2A-AJUH>.

<sup>5</sup> See, e.g., Ben S. Bernanke, *Irreversibility, Uncertainty, and Cyclical Investment*, 98(1) *Quarterly J. Econ.* 85 (Feb. 1983); Bryan Kelly et al., *The Price of Political Uncertainty: Theory and Evidence from the Option Market*, Nat’l Bureau of Econ. Rsch., Working Paper No. 19812 (Jan. 2014), <https://perma.cc/5KDY-2B2Q>.

<sup>6</sup> Oliver Jones & Courtney Ricker McCaffrey, Ernst & Young, *The CEO Imperative: Are you making political risk a strategic priority?* (May 13, 2021), <https://perma.cc/RVM6-952D>

<sup>7</sup> See Courtney Rickert McCaffrey, Ernst & Young, *How Political Risk Affects Five Areas at the Top of the C-Suite Agenda* (Oct. 29, 2020), <https://perma.cc/5YTQ-V6NU> (noting “policy uncertainty increases the average weighted cost of capital”).

<sup>8</sup> See Anat R. Admati, *Democracy and Prosperity Require Uncorrupted Governments*, Insights by Stanford Bus. (Feb. 14, 2020), <https://perma.cc/WJS9-AQMV> (explaining that government “en-

Not only do political uncertainty and instability raise the costs of capital investment and borrowing; they also result in reduced innovation<sup>9</sup> and business supply chain volatility that impairs efficiency and production.<sup>10</sup> In addition, political uncertainty depresses stock market performance,<sup>11</sup> and is associated with the flight of capital to more politically stable locations.<sup>12</sup> All of these ill effects combine to produce significantly weaker economic growth, which hurts

---

able[s] markets” and “protect[s] stakeholders” by “enforcing contracts, ensuring competition, administrating justice, protecting rights, and dealing with fraud and deception when conventions, accepted business practices, or cultural norms fail to hold actors accountable to socially acceptable behavior”).

<sup>9</sup> See Vivek Astvansh et al., *Research: When Geopolitical Risk Rises, Innovation Stalls*, Harv. Bus. Rev. (Mar. 3, 2022), <https://perma.cc/9RKG-H23D>.

<sup>10</sup> PricewaterhouseCoopers, PwC’s 25th Annual Global CEO Survey (Jan. 17, 2022), <https://perma.cc/4DUP-AJXG> (71% of surveyed CEOs anticipate geopolitical instability may “inhibit [their] ability to sell products/services”).

<sup>11</sup> Lubos Pastor & Pietro Veronesi, *Political Uncertainty and Risk Premia*, Nat’l Bureau of Econ. Rsch., Working Paper No. 17464 (Sept. 2011), <https://perma.cc/L89C-YCZS>.

<sup>12</sup> See, e.g., Quan Vu Le & Paul J. Zak, *Political Risk and Capital Flight*, 25 J. Int’l Money & Fin. 308, 309 (2006) (explaining “the quantitatively most important factors affecting capital flight are, in order, political instability, economic risk, and policy uncertainty”); John T. Cuddington, *Capital Flight: Estimates, Issues, and Explanations*, 58 Princeton Studies Int’l Fin. 11 (1986) (“When there is political or financial instability . . . mobile capital will move quickly from the risky country to a safe haven. These movements induce large and rapid adjustments in interest rates and exchange rates . . .”).



businesses, their employees and other stakeholders, and the public as a whole.<sup>13</sup>

Similar concerns regarding political uncertainty are reflected in the business community's apprehensions regarding retaliation by public officials. Recent research found that 68 percent of surveyed American business executives fear backlash from federal elected officials in the next three to five years.<sup>14</sup> These fears will only grow if the President is granted broad criminal immunity. If the Court adopted Petitioner's view, a major motivating factor driving American business would not be a spirit of entrepreneurship and socially beneficial commerce, but increasingly the need to avoid the ire and, even worse, curry the favor of the President—*any* President—and his allies. The uncertainty and fear stemming from the President's lack of personal criminal accountability even after leaving office would dampen and destabilize business activity and potentially weaken our economy.

Actual corrupt acts by the President are not required to undermine the business community's faith in the stability and regularity of our economy. Adherence to strong rule-of-law principles reflects confidence that people, governments, and companies abide by the same rules, thereby fostering increased economic growth.<sup>15</sup> A judicial ruling that the President

---

<sup>13</sup> Alberto Alesina et al., *Political Instability and Economic Growth*, 1 J. Econ. Growth 189 (June 1996).

<sup>14</sup> See PAUL WASHINGTON ET AL., THE CONFERENCE BOARD, AVOIDING THE TRAGEDY OF THE COMMONS: HOW TO IMPROVE THE POLITICAL ENVIRONMENT FOR US BUSINESS 8 (2023).

<sup>15</sup> See Sanjai Bhagat, *Eco-nomic Growth, Income Inequality, and the Rule of Law*, Harv. Bus. L. Rev. (Nov. 18, 2020), <https://perma.cc/3L8R-T3TZ>.

enjoys broad criminal immunity for anything connected to his official activities would send a powerfully negative message: that not *all* actors are subject to the same rules. For businesses, the fear that competitors may be on an unequal playing field would dampen confidence and discourage capital investment. The possibility that a President could marshal the powers and privileges of his office to favor certain businesses for personal benefit, without risk of criminal sanction, would raise significant alarm in the business community, both here and abroad.

Contrary to Petitioner's assertion, *see* Pet. Br. at 36, the risks posed by his presidential criminal immunity claim are anything but "marginal." This Court's adoption of such a doctrine to any degree would threaten to foster a culture of public corruption that, scholars have shown, would be deleterious to the economy.<sup>16</sup> The erosion of rule-of-law norms in government would inevitably infect the private sector, redoubling the negative economic impacts described above. And there is no reason to think that these impacts would be only gradual. Indeed, the immediate economic risks associated with Petitioner's claim are exacerbated by the potential for political and social disturbance arising amidst an ongoing presidential election contest in which Petitioner is a major candidate. It is critically important in the near term for this Court to restore confidence and forestall these risks

---

<sup>16</sup> *See, e.g.*, Layna Mosley, *The Financial and Economic Dangers of Democratic Backsliding*, STATES UNITED DEMOCRACY CENTER (July 2023), <https://perma.cc/VZL8-WPJ6> ("Clientelism, crony capitalism, corruption, and rent-seeking have negative effects for economies as a whole.").

by squarely and promptly rejecting Petitioner’s claim.<sup>17</sup>

**II. Petitioner’s Alleged Crimes Were Not Within the Scope of the President’s Duties and Responsibilities and Therefore Did Not Involve “Official Acts.”**

The crimes alleged against Petitioner in the Indictment are predicated upon alleged conduct far beyond any colorable understanding of the outermost scope of the President’s official duties and responsibilities. At the outset, Petitioner’s brief attempts to obscure that reality with a warped rendition of the Indictment, *see* Pet. Br. at 4–5, and asks this Court to accept the pretense that Petitioner is facing criminal charges “for his official acts.” Pet. Br. at 3. That pretense is specious; he is not.

Petitioner is accused of violating four generally applicable criminal statutes duly enacted by Congress and signed into law by the Executive, as the Constitution requires. As this Court recognized unequivocally in *Youngstown*, the President is not a lawmaker, and Congress alone makes the laws, *see* 343 U.S. at 655. “No officer of the law may set that law at defiance with impunity.” *Lee*, 106 U.S. at 220. That principle “of course” includes the President. *Trump*, 140 S. Ct. at 2432 (Kavanaugh, J., concurring).

---

<sup>17</sup> *Amicus* does not attempt in this brief to speak to all of the political and other consequences of Petitioner’s claim, which Respondent and other *amici* will doubtless address in detail. In no way, however, does *Amicus* intend to suggest that the negative consequences of countenancing Petitioner’s claim would be limited to American business or the economic realm alone.

As the Court of Appeals correctly concluded, Petitioner as President had no lawful discretion or other authority to violate federal criminal laws. *See* J.A.32. Nor does the President have any “official” authority to act beyond the scope of his constitutional and statutory duties. *See Youngstown*, 343 U.S. at 587-88. Petitioner’s allegedly willful actions in violation of such laws were not, and cannot be clothed as, “official acts.”

*Amicus* respectfully submits that it is vitally important that this Court reject any attempt to blur or obfuscate this distinction. Moreover, the Court can and should reject Petitioner’s claim in this case without fine-grained line-drawing or speculation about whether some other future case against some future former President might require it. The Court has no need to do so here, because the gravamen of Petitioner’s alleged crimes as set forth in the Indictment situates his conduct nowhere near that hypothetical line: Petitioner stands accused of engaging in a conspiracy to illegally obstruct and fraudulently subvert the constitutional transfer of power to a legitimately elected new President, and to arrogate power to himself by unlawfully retaining the Presidency based on fraud. *See* J.A.66–70, 183. When, as the Court of Appeals held, “a former President has been indicted on federal criminal charges arising from his alleged conspiracy to overturn federal election results and unlawfully overstay his Presidential term,” J.A.33, the alleged unlawful actions on which those crimes are predicated cannot plausibly be cloaked with any immunity.

This Court has repeatedly affirmed that all Presidential authority must be found in the Constitution. *See Youngstown*, 343 U.S. at 587; *United States v.*

*Nixon*, 418 U.S. 683, 705 & n.16 (explaining that the President’s implied power is not unlimited and must be reasonably grounded in an expressly granted power) (citing *McCulloch v. Maryland*, 17 U.S. 316 (1819)). As the Court of Appeals noted, neither the Constitution nor the Electoral Count Act of 1887 accords any official role for the President in counting and certifying Electoral College votes. J.A.40. Moreover, on January 6, 2021, Petitioner was not just the President; he was also a self-interested “office-seeker” whose campaign for re-election had failed. J.A.54 n.14. The misconduct alleged in the Indictment was that of an office-seeker acting personally in his self-interest, beyond the pale of a President’s “official” authority. *See* J.A.40; *see also* *Blassingame v. Trump*, 87 F.4th 1, 17 (D.C. Cir. 2023) (President’s “actions constituting re-election campaign activity” are not “official”).

Petitioner’s “Statement of the Case” attempts to obscure his alleged crimes by turning a blind eye to the substantive elements of the crimes alleged. Petitioner instead seizes on the superficial instrumentalities of the office that Petitioner may have used to advance his alleged crimes, and he tries to pretend that the criminal acts alleged can thus be legitimized as “official” conduct. But Petitioner’s mere use of what he describes as “official channels of communication”—namely, “tweets” and “public statements,” Pet. Br. at 4—to carry out his alleged criminal conspiracy cannot transform a crime into something else, nor bring it within the ambit of the President’s “official” business. Nor does it matter that the then-President assertedly had “voluminous information” concerning supposed

election fraud “available to [him] *in his official capacity*,” *id.* at 5 (emphasis added), because the Indictment alleges that Petitioner *knew at the time* that that information was false. J.A.5, 181. Since Petitioner allegedly knew the falsehood of “the conclusion that the 2020 presidential election was tainted by fraud and irregularities,” Pet. Br. at 5, his efforts to make the Vice President and state officials act “in accordance with” that known lie cannot plausibly constitute “official” acts.

Unfortunately, this Court’s formulation of the “Question Presented” in this case arguably lends some threshold credence to the misplaced supposition that the crimes charged against Petitioner allegedly “involved” his “official acts.” J.A.237. Any such suggestion in wording of the “Question Presented,” which Petitioner strains to leverage, is unfounded and should be rejected by this Court. To the extent that the “Question Presented” assumes its validity, *Amicus* respectfully submits that it tilts this Court’s inquiry perilously toward error.

As every American citizen knows, Petitioner is presumed innocent, and the Special Counsel must prove at trial beyond a reasonable doubt that the allegations of criminal conduct are in fact true. At the trial stage, however, *every* accused defendant denies the adequacy of the government’s evidentiary proof. The Indictment itself does not “allege[]” that the defendant’s crimes “involved official acts”; only Petitioner, in his own self-interest, asserts that characterization. The mere prospect that Petitioner’s *defense* may include the contention that his conduct was not criminal, but rather legally within the scope of his office, does not alter the *ultra vires* nature and

substance of the crimes affirmatively alleged and to be proved. It is for a jury of American citizens to decide whether, as alleged, Petitioner in fact violated his legal and constitutional duties to the People by committing these federal crimes while in office.

**III. This Court Should Promptly Affirm the Court of Appeals' Decision on the Specific Facts of This Case and Remand to the District Court for a Just and Speedy Trial.**

*Amicus* respectfully submits that, as the Court of Appeals concluded, Petitioner's claim of immunity from criminal prosecution under the Indictment is fundamentally at odds with the Constitution, this Court's precedents, and our nation's "historic commitment to the rule of law," *Nixon*, 418 U.S. at 708. The Court of Appeals correctly ruled that, on the specific allegations of this Indictment "arising from [Petitioner's] alleged conspiracy to overturn federal election results and unlawfully overstay his Presidential term," J.A.33, Petitioner's claim of immunity from prosecution lacks foundation and must be rejected. This Court need go no further.

*Amicus* does not presume to address in this brief all of the constitutional and other legal arguments analyzed by the Court of Appeals in affirming the District Court's rejection of Petitioner's claim. From the standpoint of the American business community, however, *Amicus* believes that at least the following points bear emphasis.

*First*, Petitioner's reliance upon the President's *civil* immunity from damages claims to support his claim of lifetime immunity from *criminal* prosecution is fundamentally unsound. The doctrine of official civil

immunity is deeply rooted in our democratic legal institutions. The American public generally, and large corporations and other businesses in particular, understand and rely upon that doctrine as a guarantor of the efficient functioning of our courts, legislatures, and other executive governmental offices. But as the Court of Appeals noted, none of the innumerable judges, legislators, and other government officials cloaked with such civil immunity has any broader immunity from prosecution, conviction, or punishment for crimes they may individually commit as officeholders. J.A.25–28. For example, “[j]udges are absolutely immune from liability for damages, but only when performing a judicial function, and even then they are subject to criminal liability.” *Nixon v. Fitzgerald*, 457 U.S. 731, 766 (1982) (White, J., dissenting); cf. *Dennis v Sparks*, 449 U.S. 24, 29 (1980) (judge remained criminally liable for bribery conspiracy involving tainted injunction, even though injunction itself was civilly immunized as “official act”).

The President is no exception to this rule. As Justice White emphasized in *Fitzgerald*: “[T]here is no contention that the President is immune from criminal prosecution in the courts. . . . *Nor would such a claim be credible.*” 457 U.S. at 780 (White, J. dissenting) (emphasis added). Moreover, while Petitioner places great weight on the breadth of the presidential civil immunity doctrine enunciated in *Fitzgerald*, in fact the Court there found that the civil suit at issue did not just indirectly or incidentally involve, but rather was directly “based” and “predicated” on executive conduct (the firing of an executive branch officer) “well within” the circumference of presidential au-



thority. *Id.* at 731, 754. In contrast, the willful criminal conspiracy to subvert the electoral process on which the crimes alleged in the Indictment here are predicated lies far beyond the boundary of such authority. Nothing in *Fitzgerald* suggests otherwise.

The distinction between official civil immunity and personal accountability for criminal violations is widely understood and sustained as a fundamental guardrail against official misconduct. The limited veil of civil immunity does not justify and cannot be mistaken for a shield against personal prosecution and punishment for crimes. Petitioner's attempt to collapse this distinction should be rejected.

*Second*, Petitioner's assertion that, under his theory, the Impeachment Judgement Clause would provide some meaningful check against presidential malfeasance, *see* Pet. Br. at 16–22, is unrealistic and at odds with common sense. To the contrary, a President immune from criminal sanction absent impeachment and removal would have an overwhelming incentive to engage in whatever criminal or other unlawful conduct he “officially” deems necessary to thwart the impeachment process. Armed with the knowledge that even his acts of bribery and criminal violence or intimidation would remain shielded with immunity for life, the President would have unlimited means at his disposal to corrupt or cow enough Representatives and Senators to stave off impeachment and prevent removal. Under Petitioner's theory, that is all it would take to retain power with complete impunity.

The American public has become familiar with the impeachment process and its practical limits in sanctioning and deterring presidential misconduct. As political representatives, members of Congress may vote

not to impeach or to acquit a President for myriad reasons unrelated to the merits of the charged offense.<sup>18</sup> They may be influenced or blinded by other shared political interests with the President. Under Petitioner’s theory, the elimination of any effective brakes on the President’s machinations would drastically exacerbate these tendencies. The suggestion that presidential criminal immunity would at worst produce only a few minor “marginal cases” of criminal impunity that are “worth the risk,” Pet. Br. at 36, is no more than wishful thinking. Indeed, Petitioner’s assurances contradict the Founders’ own fundamental beliefs about power and human nature. *See, e.g.*, The Federalist No. 51 (James Madison) (“It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. . . . If men were angels, no government would be necessary.”); The Federalist No. 6 (Alexander Hamilton) (“Is not the love of wealth as domineering and enterprising a passion as that of power or glory?”). It would be naïve to rely on the hope that a President given an extra inch will take but an inch.<sup>19</sup>

*Third*, as the Court of Appeals concluded, there is no foundation for Petitioner’s suggestion that absolute immunity from criminal prosecution is necessary to

---

<sup>18</sup> For example, several Senators who voted to acquit Petitioner during his second impeachment trial provided reasoning unrelated to whether they thought Petitioner was guilty. *See, e.g.*, Mitch McConnell, Remarks on Impeachment (Feb. 13, 2021), <https://perma.cc/YM6C-3AUB>.

<sup>19</sup> “For he that thinks absolute Power purifies Mens Bloods, and corrects the baseness of Humane Nature, need read but the History of this, or any other Age to be convinced of the contrary.” John Locke, Second Treatise on Government, Ch. 7, § 92.

allow the President to effectively fulfill his constitutional duties. As this Court has recognized, ample existing safeguards protect Presidents from unwarranted or malicious prosecution. *See, e.g., Trump v. Vance*, 591 U.S. 786 (2020) (pointing to restrictions on grand juries). Petitioner’s asserted fear that the “specter of criminal prosecution” might interfere with Executive policymaking, Pet. Br. at 15, is groundless: in a nation of laws, the President’s solicitude in avoiding criminal violations is salutary. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (“Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate.”). In any event, the fact that the criminal prosecution of a former President has never before occurred in American history does not support, but rather negates, Petitioner’s assertion.

*Finally*, given the momentous public importance and time-sensitivity of the Special Counsel’s prosecution, it is imperative for this Court to apply the well-established doctrine of constitutional avoidance and promptly reject Petitioner’s claim on the narrowest available grounds. *See, e.g., Clinton*, 520 U.S. at 690 & n.11 (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905)); *Liverpool, New York & Philadelphia Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885) (declaring that the Court may neither “anticipate a question of constitutional law in advance of the necessity of deciding it” nor “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied”). As discussed in part II above, the specific

allegations of the Indictment create no need or warrant to map the borderline of presidential powers before rejecting Petitioner's criminal immunity claim here. Even if some hypothetical "hard" case at the arguable margins of the President's official authority might be posited with regard to some other alleged criminal violation, that is not this case.

The need for a swift ruling by the Court in this case is clear. "The public . . . has a definite and concrete interest in seeing that justice is swiftly and fairly administered." *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979). Moreover, a public trial will ensure that the proceedings against the defendant will be subjected to contemporaneous review in the forum of public opinion. Such review here is critical to public confidence in our democratic institutions and to "the ability of the citizenry to make informed choices among candidates for office," *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976). Unnecessary delay also exacerbates economic uncertainty and shakes business confidence. Accordingly, *Amicus* respectfully submits that this Court should act with urgency in denying Petitioner's claim and remanding this case for trial.

**CONCLUSION**

For the foregoing reasons, *Amicus* respectfully submits that the decision of the Court of Appeals should be affirmed.

Respectfully Submitted,

P. Benjamin Duke  
*Counsel of Record*

William E. Meyer  
COVINGTON & BURLING LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, DC 20001

Jordan B. Bakst  
Jesse Y. Chang  
Ryan A. Partelow  
COVINGTON & BURLING LLP  
The New York Times Bldg.  
620 Eighth Avenue  
New York, New York 10018  
pbduke@cov.com  
(212) 841-1000

*Counsel for Amicus Curiae*

April 8, 2024