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 *AMICI CURIAE* OF JOHN DANFORTH, J. MICHAEL LUTTIG, BARBARA COMSTOCK, CARTER PHILLIPS, PETER KEISLER, LARRY THOMPSON, STUART GERSON, *ET AL.*, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The *amici* named in Appendix A submit this brief. *Amici* include former officials who worked in numerous administrations from former Presidents Nixon to Trump, including officials in the White House and Departments of Justice, Homeland Security, and Defense, former members of Congress, and others who support a strong Presidency.[1] *Amici* have an interest in a strong Presidency where each elected President serves only the term or terms to which he or she has been elected. *Amici* speak only for themselves personally, and not for any entity or other person.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Presidential immunity, under any label, should never be so broad as to embolden an outgoing President's violations of federal criminal statutes as part of efforts that would prevent what Article II mandates—the vesting of the authority and functions of the Presidency in the next, lawfully-elected President. This basis to affirm rests on a compelling legal principle: Any presidential immunity has to flow from protecting Article II and the Presidency it designs. But there can be no Article II rationale for extending criminal immunity to a former President's alleged

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[1] *Amici* state that no counsel for any party authored this brief in whole or in part and that no entity, aside from *amici* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

federal crimes undertaken in efforts that would *violate* Article II's provisions that limit a presidential term to four years and vest the executive power in the duly-elected successor.

One dispositive basis that fully sustains the judgment of the D.C. Circuit is that a President does not have immunity to engage in unofficial or official acts that constitute federal statutory crimes that would overturn presidential election results. J.A. 33, 40-44. A core allegation of the Indictment is that Mr. Trump knew that it was false to say there had been "outcome-determinative voting fraud in the [2020] election," but nonetheless engaged in criminal lies and conspiracies "to overturn the legitimate results of the 2020 presidential election."[2] Under these allegations, former President Trump's violations of federal criminal statutes, if successful, would have usurped the authority and functions of the Presidency for the current term to which President Biden was legitimately elected. That constitutes an alleged effort that, if successful, would have violated Article II, Section 1, Clause 1, also called the Executive Vesting Clause, and the Twentieth Amendment.

The context of former President Trump's alleged crimes, even *assuming* some crimes involved an official act, presents an especially weak case for

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[2] Indictment (J.A. 180-236), ¶¶ 2, 4, 7-8; *see also, e.g.*, *id.* at ¶¶10-13, 15, 19-22, 25, 29-33, 35-37, 41, 45-46, 50-52, 56, 64, 66-67, 70, 74, 77, 81, 83, 86, 90, 92-93, 99-100, 102, 104, 116, 118.

extending presidential immunity to federal criminal prosecution. *Nixon v. Fitzgerald,* 457 U.S. 731 (1982), emphasized that the justification for civil immunity is not to protect any individual President, but rather "the Nation that the Presiden*cy* was designed to serve." *Id.* at 753 (emphasis added). The last thing that would serve the Nation, the Presidency, and Article II would be to embolden Presidents who lose reelection to engage in federal criminal statutory violations as part of efforts to *prevent* the vesting of executive power required by Article II in their lawfully-elected successors. The scope of federal criminal immunity proposed by Mr. Trump would turn *Nixon v. Fitzgerald* on its head by encouraging the greatest possible threat of "intrusion on the authority and functions of the Executive Branch," *id.* at 754 — a losing President's criminal efforts that would usurp the authority and functions of a duly-elected successor President. As George Washington stated, it would "destroy[]" our constitutional system if "cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and *usurp* for themselves the reins of government." Washington's Farewell Address, at 14 (1796) (emphasis added).[3]

The D.C. Circuit's narrow holding was that: "The Executive Branch's interest in upholding Presidential elections and vesting power in a new President under the Constitution and the voters' interest in

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[3] Available at https://www.govinfo.gov/content/pkg/GPO-CDOC-106sdoc21/pdf/GPO-CDOC-106sdoc21.pdf.

democratically selecting their President . . . compel the conclusion that former President Trump is not immune from prosecution under the Indictment." J.A. 33-34. The Court emphasized: "[O]ur analysis is specific to the case before us, in which 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. As the court reiterated: "We cannot accept former President Trump's claim that a President has unbounded authority to commit crimes that would neutralize the most fundamental check on executive power — the recognition and implementation of election results." J.A. 43.

Part I of this brief reviews the pertinent constitutional provisions and history. Part II demonstrates that the need to protect Article II by deterring usurpation of the Presidency provides a compelling ground for rejecting presidential immunity for the category of *federal* crimes undertaken on or after election day in efforts that would overturn presidential election results. This brief will call this category "Post-Election Usurpation Crimes." Rejecting presidential immunity for Post-Election Usurpation Crimes would not preclude possible federal criminal immunity for a former President's official acts in some different situation, such as using or preparing to use the military abroad or foreign relations activities. *See United States v. Nixon*, 418 U.S. 683, 707, 710, 712 n.19 (1974).

Part III shows that under separation-of-powers principles, Congress has the power to enact federal crimes of sufficient scope to protect the constitutionally-mandated transfer of executive power against the criminal efforts of an outgoing President that would overturn presidential election results. Under the framework of Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952) ("*Youngstown Concurrence*"), when a President commits Post-Election Usurpation Crimes, even if by an assumedly official act, that President's "power is at its lowest ebb." *Id.* at 637.

Part IV examines the dangers of creating any immunity from prosecution for a former President's Post-Election Usurpation Crimes. Here, for example, the former President contends that he was acting officially when he allegedly conspired to commit federal criminal conduct by using Department of Justice personnel to make false statements to state officials to support his efforts to overturn state election results. Indictment, ¶¶ 70, 75, 78-79, 84. If that sufficed for presidential immunity, the precedent would improperly encourage a future President to violate federal criminal statutes by, for example, deploying domestically Department of Defense personnel, and other armed federal personnel, in efforts to overturn presidential election results.

Part V shows that because of other protections, a future President does not need presidential immunity to contest zealously future presidential election results. These protections include the mens rea and

other elements in federal criminal statutes. These protections are illustrated by the narrowly-drawn Indictment in this case.

ARGUMENT

I. A PRESIDENT'S FEDERAL CRIMES IN EFFORTS THAT WOULD OVERTURN PRESIDENTIAL ELECTION RESULTS THREATEN THE EXECUTIVE VESTING CLAUSE AND THE TWENTIETH AMENDMENT.

Article II, Section 1, Clause 1 of the Constitution provides:

> The executive Power shall be vested in a President of the United States of America. He shall hold his Office *during the Term of four Years*, and, together with the Vice President, chosen for the same Term, *be elected*, as follows . . . .

(Emphases added).

Former President Trump argues that he should be granted presidential immunity based on the "Executive Vesting Clause." Pet. Br. 10-11. This has it backwards. The second sentence of the Executive Vesting Clause mandated that Mr. Trump leave office at the end "of four Years" after he lost. This mandate is reiterated by the Twentieth Amendment. Post-Election Usurpation Crimes pose the most serious threat to the Executive Vesting Clause.

The Constitutional Convention initially adopted provisions of a draft Constitution that would have elected a President for a single seven-year term and made each President ineligible for reelection. 1 *Records of the Federal Convention,* 64, 68-69 (M. Farrand ed., Yale University Press 1911). The Convention later switched course and enabled a President to seek reelection, but the Executive Vesting Clause required that President to leave at the end of his term if he lost.

This change was an important selling point during ratification. In Federalist No. 39, James Madison wrote that two features that made the United States created by the Constitution "a genuine republic" were that "[t]he President is indirectly derived from the choice of the people" and holds office for "a limited period," namely "the period of four years."[4]

This was described in further detail by Edmund Randolph to the Virginia Ratifying Convention. Randolph explained that his original position at the Constitutional Convention had been "that the reeligibility of the President was improper." 3 *The Debates in the Several State Conventions* 485 (J. Elliot ed., 2d ed. 1836). He "altered [his] opinion" and subsequently defended the Constitution's permission for reelection by relying on the mandates of the Executive Vesting Clause. *Id.* at 485-86. He stated that a sitting President "cannot hold [his office] over four years, *unless*

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[4] THE FEDERALIST NO. 39 (James Madison).

he be reelected, any more than if he were prohibited [from running]." *Id.* at 486 (emphasis added). Randolph stated that a President who loses reelection is "displaced at the end of the four years" by the Executive Vesting Clause. *Id.* at 486.

As Chief Justice Marshall put it, "the president is elected from the mass of the people, and, *on the expiration of the time for which he is elected*, returns to the mass of the people again." *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (Marshall, Circuit Justice) (emphasis added). The Twentieth Amendment reiterates the mandate that a President peacefully relinquish executive power to his or her successor: "The terms of the President and the Vice President *shall end* at noon on the 20th day of January . . .; and the terms of their *successors shall then begin.*" (Emphases added).

Any President who loses reelection, but violates federal criminal statutes in efforts that would overturn the results, threatens two violations of the Executive Vesting Clause and Twentieth Amendment. First, that President would threaten to extend the four-year term in which executive power has been vested by election in that President. Second, that President would threaten to prevent the vesting of the authority and functions of the Presidency in the *newly-elected* President.

II. A FORMER PRESIDENT DOES NOT HAVE IMMUNITY FROM CRIMES UNDERTAKEN IN EFFORTS THAT

WOULD OVERTURN PRESIDENTIAL ELECTION RESULTS.

What kind of Constitution would immunize and thereby embolden losing first-term Presidents to violate federal criminal statutes—through either official or unofficial acts—in efforts that would usurp a second term? Not our Constitution, where the Executive Vesting Clause and the Twentieth Amendment mandate: four years, you lose reelection, you get out, and the Presidency is vested in your successor.

No case supports any immunity for a former President's Post-Election Usurpation Crimes. *Nixon v. Fitzgerald* addressed immunity from civil damages. *Nixon v. Fitzgerald* explained that the Court "must balance the constitutional weight of the interest to be served [by civil damages] against the dangers of intrusion on the authority and functions of the Executive Branch." 457 U.S. at 754. The Court cautioned that "[i]n defining the scope of an official's absolute privilege, . . . the sphere of protected action must be related closely to the immunity's justifying purposes." *Id.* at 755.

Nixon v. Fitzgerald reserved deciding whether presidential immunity applies at all—much less in which cases—to violations of federal criminal statutes. *Nixon v. Fitzgerald* explained that the balancing would be different: "[t]he Court has recognized . . . that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions." *Id.* at 754 & n.37. Before *Nixon*, *Mississippi v.*

Johnson also expressly left unaddressed whether a President "may be held amenable, in any case, otherwise than by impeachment for crime." 71 U.S. 475, 498 (1867).

In *Trump v. Vance,* 591 U.S. 786 (2020), then-President Trump sought an immunity from a state grand jury subpoena concerning private conduct. Justice Kavanaugh's concurrence stated that when a sitting President seeks an immunity in the context of a state criminal investigation, a court must "balance" the "interests of the criminal process and the Article II interests of the Presidency." *Id.* at 812-13. In *Vance,* as in *Nixon v. Fitzgerald* and *Johnson,* "the Article II interests of the Presidency" were entirely on the side of the sitting or former President.

In marked contrast to those cases, the current case involves a prosecution for a President's alleged federal crimes that threatened the most serious "intrusion on the authority and functions of the Executive Branch." *Nixon v. Fitzgerald*, 457 U.S. at 754. An outgoing President allegedly violated federal criminal statutes as part of efforts that, if successful, would have usurped the functions and authority of a lawfully-elected successor President. In this new and different context, both the "interests of the criminal process" *and* "the Article II interests of the Presidency" are aligned and oppose federal criminal immunity.

Context matters when this Court decides both whether and to what extent a court-defined immunity exists or applies. As *Westfall v. Erwin*, 484 U.S. 292

(1988), explained in unanimously choosing a narrower scope of absolute immunity for federal officials from liability under state law for official acts, the Court's task is to determine whether and to what extent any immunity applies "*in particular contexts*." *Id.* at 299 (emphasis added).

Even *assuming* criminal immunity for a former President might apply in other situations, immunity should not extend to the category of Post-Election Usurpation Crimes. Section 1 of Article II, as reiterated by the Twelfth and Twentieth Amendments, protects the Presidency by specifying *who* is vested with executive powers. The interests of Article II *support* a criminal prosecution of a former President's Post-Election Usurpation Crimes to protect Article II's assignment of "who" is vested with executive powers. *Amici* believe that protecting the Constitution also opposes federal criminal immunity in many situations involving only "how" executive powers were exercised. But the Executive Vesting Clause and Twentieth Amendment provide an additional, dispositive basis for denying immunity for Post-Election Usurpation Crimes for four reasons.

First, deterring Post-Election Usurpation Crimes protects the Presidency designed by Article II itself. Article II is deeply concerned with ensuring that "who" is President is the person elected pursuant to Article II. Mr. Trump emphasizes the need to encourage a President to engage in "'bold and unhesitating action.'" Pet. Br. 7 (citation omitted). Nothing in Article II could justify immunizing and encouraging "bold

and unhesitating" criminal conduct by a President to seize control of the office beyond the term to which he or she has been elected.

Former President Trump argues that the prospect of federal prosecution will have chilling effects on Presidents in *other* contexts. Pet. Br. 22-23. This conflates the narrow category of Post-Election Usurpation Crimes with a President's activities outside that category. The chilling effects that Mr. Trump offers relate almost entirely to the use of the military abroad or to foreign relations. Pet. Br. 22-23; *cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018) (border security is part of "'the context of international affairs and national security'") (citation omitted). Akin to *United States v. Nixon*, 418 U.S. at 707, 710, 712 n.29, this Court should reject presidential immunity for Post-Election Usurpation Crimes, while recognizing possible presidential immunity from prosecution for presidential actions in using the military abroad (and in preparing to do so) and foreign relations.

Moreover, when "chilling effects" arguments are raised, this Court also considers the "value [that] lies in protecting against . . . profound harms." *Counterman v. Colorado*, 600 U.S. 66, 80 (2023); *id.* at 107 (Barrett, J., dissenting) ("True threats carry little value and impose great cost."). There is no more profound threatened harm under Article II than criminal efforts that would usurp the Presidency.

Second, deterring Post-Election Usurpation Crimes protects Article II's design for presidential elections. The Executive Vesting Clause mandates—and the Twentieth Amendment reiterates—that a first-term President must leave at the end of a four-year term when the people have elected someone else. "To justify and check" the President's "unique [authority] in our constitutional structure," Article II "render[s] the President directly accountable to the people through regular elections." *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2203 (2020). Article II's "direct[] account[ability]," *id.*, is antithetical to creating an immunity for a President who loses reelection but commits Post-Election Usurpation Crimes.

Part and parcel of Article II's design for the Presidency is specifying which officials determine presidential election results. The Executive Vesting Clause requires that the President "be elected, *as follows* . . . ." (Emphasis added.) Pursuant to the immediately following Clause 2 of Section 1 of Article II, state law sets forth which state officials determine who won each state. Under Clause 3, as reiterated by the Twelfth Amendment, the lists of electoral votes are "open[ed]" and "counted" in the presence of Congress and the Vice President.

One key reason Article II did not assign even a ceremonial role to a President concerning presidential election results is that a President has a powerful incentive to employ dishonesty or coercion to avoid the ignominy of electoral defeat. Ignoring this, former

President Trump suggests that presidential immunity should protect from prosecution a former President who made a "corrupt bargain" with a Speaker of the House to steal the Presidency. Pet. Br. 22 (discussing John Quincy Adams). But this Court has rejected absolute immunity where in a particular context the holders of such immunity would have a strong incentive to break the law. *See Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985) ("The danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity."). Here, it would turn Article II on its head to create any immunity that encouraged a President to violate federal criminal statutes by seeking to corrupt, deceive, or coerce the officials to whom, unlike the President, Article II assigns duties concerning presidential election results.

Third, the "public interest," *Nixon v. Fitzgerald*, 457 U.S. at 754, could not be higher in federal criminal prosecutions that protect the Executive Vesting Clause and the Twentieth Amendment. Accordingly, there should be no immunity from federal prosecution for a former President's Post-Election Usurpation Crimes—whether by official or unofficial acts.

Fourth, the rare category of Post-Election Usurpation Crimes involves the narrowest sliver of potential federal criminal cases. *See Mitchell*, 472 U.S. at 522 (rejecting absolute immunity in particular context where "unfounded and burdensome litigation" would be "rare"). It is nonsense to argue that this "'narrow'

exception would rapidly swallow the rule." Pet. Br. 49. The category of Post-Election Usurpation Crimes derives from the constitutionally-mandated transfer of executive power following presidential election results. *See* Parts I-II, *supra*. Therefore, that category applies only to criminal efforts that, if successful, would overturn presidential election results, and *not* remotely to every action that affects a President's "getting reelected." Pet. Br. 50.

III. SEPARATION OF POWERS OPPOSES ANY CRIMINAL IMMUNITY FOR A FORMER PRESIDENT'S OFFICIAL ACTS THAT WOULD OVERTURN PRESIDENTIAL ELECTION RESULTS.

A. "At its lowest ebb"

A President's criminal efforts to overturn presidential election results are either unofficial acts or, at most, might fall at the farthest edge of the outer perimeter of a President's official acts. *See Lindke v. Freed,* 601 U.S. ----, 144 S.Ct. 756, 2024 WL 1120880, at *10 (2024) (an elected official's statements "to promot[e] his prospects for reelection" are for "personal reasons," and not governmental action). Either way, under Justice Robert Jackson's three-category framework for analyzing separation-of-powers arguments concerning a President, the Court should not create any presidential immunity from federal criminal prosecution for Post-Election Usurpation Crimes. The third category is:

> When the President takes measures incompatible with the express or implied will of Congress, *his power is at its lowest ebb*, for then he can rely only upon his constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized *with caution*, for what is at stake is the equilibrium established by our constitutional system.

Youngstown Concurrence, 343 U.S. at 637-38 (emphases added).

Justice Robert Jackson explained that separation of powers would be nullified if a President could evade a statute enacted by Congress merely by invoking, as former President Trump does here, Article II, Section 1's vesting of executive power and Article II, Section 3's power to "'take Care that the Laws be faithfully executed. . . . .'" *Id.* at 640-41, 646. Adopting such boundless arguments would both lead to "unlimited executive power" and negate "the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules." *Id.* at 641, 646. "Men [and women] 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." *Id.* at 655.

In particular, nothing in Article II warrants giving Presidents powers that "supersede representative government of internal affairs." *Id.* at 644. And as *Trump v. Anderson* recently reiterated, under Article II, "'the [elected] President . . . represent[s] *all* the voters in the Nation.'" *Trump v. Anderson,* 144 S. Ct. 662, 670 (2024) (*per curiam*) (emphasis and second brackets in original). Here, former President Trump allegedly violated federal criminal statutes as part of efforts that would have substituted a usurper for the newly-elected President—and therefore the representative—chosen by the Nation's voters. Where a prosecution under a federal criminal statute protects *the Presidency* against this greatest of injuries to *the Presidency*, there can be no separation-of-powers violation. Under Category 3 of the *Youngstown Concurrence,* no context could less justify a presidential immunity than violations of federal criminal statutes in efforts that would wrongfully seize the Presidency.

B. "The unelected and politically unaccountable branch"

"At our founding people fought a revolution for the right not to be ruled by a monarch or any other unelected elite, judges included." Neil Gorsuch, A REPUBLIC, IF YOU CAN KEEP IT 7 (2019). Judicial creation of any presidential immunity for Post-Election Usurpation Crimes would violate separation of powers by arrogating legislative powers to this Court. "Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the

Federal Government assuming such an extraordinary and unprecedented role." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

First, Congress has the power to enact federal criminal statutes whose operation protects the transfer and vesting of "the executive power" pursuant to "election" against "impairment or destruction, whether by force or by corruption." *Burroughs v. United States*, 290 U.S. 534, 545 (1934). Article I, Section 8, Clause 18 empowers Congress: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." When the operation of a federal criminal statute protects the constitutionally-mandated transfer of executive power, that statute assists "carrying into Execution" the vesting and exercise of executive power in and by an elected successor President.

Second, "Congress is in the best position to provide guidance for the complex and often empirical inquiry whether absolute [or any] immunity is warranted in a particular context." *Westfall,* 484 U.S. at 300. Congress has used its necessary-and-proper power to legislate certain civil immunities for every executive branch officer or employee "while acting within the scope of his office or employment." *See, e.g.,* 28 U.S.C. § 2679(b). Congress also has enabled, under certain conditions, the removal of "a civil action or criminal prosecution" from state court to federal court by "any

officer (or person acting under that officer) of the United States." 28 U.S.C. § 1442(a)(1). Moreover, in 1999 Congress let the Independent Counsel provisions of the Ethics in Government Act expire because it perceived that some investigations had unduly distracted sitting Presidents. *See* Brett Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1462 n.36 (2009).

The issue here is *not* what are the federal criminal immunities for a former President, and in which contexts, that this Court's Justices would support if they were members of Congress. The issue is which federal criminal immunities in which contexts, if any, are so essential to protecting the Presidency that the Constitution *requires* that this Court create them despite the fact that for 235 years politically-accountable Congresses have not legislated them. Here, however, protecting the Presidency *opposes* any court-created immunity for a former President's Post-Election Usurpation Crimes. *See* Parts I-III.A-B, *supra*.

C. "With caution"

The Court would properly proceed "with caution," *Youngstown Concurrence,* 343 U.S. at 638, by rejecting presidential immunity for unofficial and official acts that constitute Post-Election Usurpation Crimes. The Court could leave for any future case any questions about presidential immunity for official acts in other contexts, and should also note that Congress remains free to legislate any presidential immunity in any context.

Mr. Trump incorrectly argues that rejecting presidential immunity for Post-Election Usurpation Crimes would be a "gerrymandered" result. Pet. Br. 47-48. To the contrary, that cautious approach rests on a principled legal basis, while avoiding unnecessarily addressing potentially distinguishable issues.

Rejecting presidential immunity for Post-Election Usurpation Crimes will help deter *every* future President from engaging in that category of federal crimes. For example, doing so would help deter a second-term President from violating a federal criminal statute to overturn the presidential election defeat of that President's acolyte. A second-term President might have a strong incentive to overturn such an election defeat for political reasons, *see* Dist. Ct. Doc. 122, at 11-12 (Mr. Trump's brief discussing President's Grant's efforts to overturn 1876 results), or for personal advantage, including avoiding federal prosecution for unofficial acts.

This Court often employs a narrow, principled category to resolve a case, and leaves issues that are unnecessary to decide for future development. Recently, for example, *Trump v. Anderson* emphasized that "it is the combination of all the reasons set forth in this opinion . . . that resolves this case." 144 S. Ct. at 671.

Mr. Trump also argues that *Nixon v. Fitzgerald* precludes rejecting immunity because the category of Post-Election Usurpation Crimes rests on "improper motive." Pet. Br. 47-49. This is wrong for three reasons. First, this category rests on protecting the

constitutionally-mandated transfer of executive power, *not* on motive. The category applies where, regardless of motive, the impact of a President's federal crimes, if successful, would overturn presidential election results. Suppose a President, despite losing in court, continues to believe he or she won because a State did not reject enough mail-in ballot signatures. That President then makes criminally-false statements to state officials, Department of Justice officials, and members of Congress and the Vice President about other subjects—including that there were more votes than voters, that large numbers of dead people, non-citizens, and non-residents voted, and that machines switched votes away from that President. *See* Indictment, ¶¶ 12, 15, 21, 31, 35, 45, 51, 74, 86, 90, 93. The category of Post-Election Usurpation Crimes applies.

Second, Mr. Trump's argument would immunize every federal crime that requires scienter. But a criminal statutory scienter element weakens the argument for any presidential immunity. As here, such elements narrow the scope of criminal liability. *See* 18 U.S.C. §§ 371 ("conspire . . . to defraud"); 1512(c) ("corruptly"); 1512(k) ("conspires to commit"); 241 ("conspire to injure, oppress, threaten, or intimidate"). Scienter elements also *refute* Mr. Trump's claim of "chilling effects." A criminal scienter requirement minimizes any "potential to chill" conduct "outside the[] boundaries" of the criminal category. *Counterman*, 600 U.S. at 75.

Third, *Nixon v. Fitzgerald* expressly left open whether and to what extent presidential immunity would apply to federal crimes. 457 U.S. at 754 & n.37. Therefore, Petitioner's reliance in a criminal case on what *Nixon v. Fitzgerald* said about purpose in a civil action begs the question.

D. This Appeal Is An Improper Vehicle For Defenses Never Raised Below.

1. Qualified Immunity

This appeal is an improper vehicle for this Court to create a qualified immunity never raised below. First, Mr. Trump did not raise any qualified immunity argument by the District Court's October 23, 2023 motion deadline. Dist. Ct. Doc. 82, at 6. To the contrary, Mr. Trump put all his immunity eggs in the "absolute immunity" basket, arguing in both the District Court and Circuit Court that presidential immunity applies to all official acts regardless of how illegal those acts were. Dist. Ct. Doc. 74, at 23, 25; Circuit Court Doc. 2033200, at 9, 32-38. The Federal Rules of Criminal Procedure provide no exemption for the post-Presidency litigation decisions of Mr. Trump. Under Rule 12(c)(3), if Mr. Trump is to raise belatedly a qualified immunity defense, he must first "show[] good cause" to the District Court. *See also* Fed. R. Crim. P. 51(b) (requiring a defendant to "preserve a claim of error by informing the [district] court").

Second, like all criminal defendants, a former President is already protected by "the 'fair warning' requirement," which "*is identical*" to "the qualified immunity standard" in civil cases for executive officials. *Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002) (emphasis added) (citing cases). Relabeling a fair warning defense as "qualified immunity," but only for a former President, would improperly create a new ground for a collateral order appeal. But this Court "ha[s] interpreted the collateral order exception 'with the utmost strictness' in criminal cases." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (citation omitted). Certainly, a case where a "qualified immunity" defense was not mentioned below is not the vehicle to depart from that "utmost strictness."

Third, even assuming Presidents may have a qualified immunity defense from federal criminal prosecution in some contexts, this Court should not create any qualified immunity for Post-Election Usurpation Crimes. Qualified immunity is designed to embolden its holder, *see* Pet. Br. 46, and there is no basis to embolden a President to make criminal efforts that would overturn presidential election results. *See* Parts II-III.A-B, *supra*.

2. Statutory Interpretation

This appeal is an improper vehicle for Mr. Trump's belated argument that the criminal statutes under which he was indicted do not clearly state that they apply to "official action of the President." Pet. Br.

38-40. First, statutory interpretation canons are not immunity arguments and thus fall outside this Court's Question Presented.

Second, Mr. Trump never raised in any court below any argument that a criminal statute must contain a reference to the "official action of the President," *id.*, much less as an immunity argument. Mr. Trump inaccurately cites his motion to dismiss "Based On Statutory Grounds," D. Ct. Doc. 114—not his separate immunity motion. That statutory motion invoked only *different* canons involving the First Amendment, due process, and lenity. *Id.* at 15-19, 23. The District Court's ruling on that statutory motion has been stayed at Mr. Trump's insistence. And Mr. Trump made no statutory interpretation argument of any kind in the D.C. Circuit.

Third, at most, a clear statement exemption for a former President would apply in a federal criminal case only if two conditions were both met: (a) the statutory noun identifying offenders may fairly be read as too narrow to include a President and (b) "*such application* [of the statute] would involve a possible conflict with his constitutional prerogatives." *Application of 28 U.S.C. § 455 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 352 (1995) (emphasis added); *see also Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018) (constitutional-doubt canon requires both ambiguity and "serious doubt" whether broader reading violates the Constitution); A. SCALIA & B. GARNER, READING LAW 250 (2012)

("The doubt must be 'substantial.'"). Neither condition is met here.

The first condition fails because the only fair reading is that the all-encompassing nouns in the statutes employed in the Indictment include a President. *See* 18 U.S.C. §§ 2 ("Whoever"); 241 ("two or more persons"); 371 ("two or more persons"); 1512(c) ("Whoever"); 1512(k) ("Whoever"). The fair reading of "whoever" and "persons" is much broader than "agency," which did not apply to the President in *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992). If "whoever" and "persons" are not broad enough, then every official act of a President is likely exempt from every existing federal criminal statute. Mr. Trump's argument would exempt a President's official act ordering an opponent's murder—as "whoever" is the noun used in the federal murder statutes. 18 U.S.C. §§ 2, 1111-1114. It would also exempt an official act of a President that was part of a rebellion or insurrection, as 18 U.S.C. § 2383 also uses "[w]hoever." *Cf. Trump v. Anderson*, No. 23-719, Oral Arg. Tr. at 54 (U.S. Feb. 8, 2024) (Mr. Trump's counsel asserts that "presidential immunity" applies "under 2383").

Indeed, Mr. Trump's argument would mean that former President Nixon was exempt from criminal prosecution in Watergate. In the indictment of John Mitchell and others—for which former President Nixon was an unindicted co-conspirator—every general criminal statute used the nouns "whoever" or "persons." *See United States v. Mitchell, et al.*, Indictment (D.D.C. March 1, 1974) (alleging violations of 18

U.S.C. §§ 371, 1001, 1503, 1621, 1623). There, the presidential election-related conduct alleged to violate 18 U.S.C. § 371 included what doubtlessly would be, per Mr. Trump's arguments, official acts—potential use of CIA funds, interactions with the Department of Justice and the FBI concerning "official business," meeting with senior White House staff in the Oval Office, and possible grants of "executive clemency." *Id.*, Count One, ¶¶ 13, 15-16, 17(f)-(g), 18 (Overt Acts 8, 33, 44).

Moreover, the second condition fails because a President has zero constitutional prerogatives in determining presidential election results. Congress undoubtedly has the power to include a former President's official act as part of a federal crime where that crime, if successful, would overturn presidential election results. *See* Parts II-III.A-B, *supra*.

IV. UNDER MR. TRUMP'S ARGUMENTS, A FUTURE PRESIDENT COULD DISREGARD FEDERAL CRIMINAL PROHIBITIONS AGAINST USING THE MILITARY AND OTHER ARMED FEDERAL PERSONNEL TO OVERTURN PRESIDENTIAL ELECTION RESULTS.

Under the *Youngstown Concurrence,* when a President turns the military "inward"—that is, when the President uses the military both domestically and "not because of rebellion"—the President "is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a

representative Congress. . . . No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role." 343 U.S. at 645-46. Yet, presidential immunity for criminal misuse of the military and other armed federal personnel to overturn presidential election results would follow from former President Trump's arguments.

The Indictment alleges that Mr. Trump "attempted to use the Justice Department to make knowingly false claims of election fraud to officials in the targeted states through a formal letter under the Acting Attorney General's signature" that urged "the targeted states to replace legitimate Biden electors with the Defendant's." Indictment, ¶¶70, 75; *see also id.* ¶¶78-79, 84. Mr. Trump has argued these were official acts because the President "oversaw" and could "replace the Acting Attorney General." Appl. at 5. Under Mr. Trump's boundless arguments, a future President would also be emboldened to direct the Secretaries of Defense and Homeland Security (and others) to deploy the military and other armed federal personnel to support efforts to overturn that President's reelection loss.

Existing federal criminal statutes deter a President's use of the military and armed federal personnel to overturn presidential election results. In addition to the statutory provisions in the Indictment, 18 U.S.C. § 593 makes it a crime when "an officer or member of the Armed Forces of the United States . . .

imposes or attempts to impose any regulations for conducting any general or special election in a State, different from those prescribed by law, or . . . interferes in any manner with any election officer's discharge of his duties." 18 U.S.C. § 2(a) makes it a crime when anyone "aids, abets, counsels, *commands*, induces or procures" commission of an offense under 18 U.S.C. § 593. (Emphasis added.) *See also* 18 U.S.C. § 2(b) (criminalizing "[w]hoever willfully causes an act to be done which if directly performed by him *or another* would be an offense against the United States") (emphasis added)).

Under 18 U.S.C. § 595, it is also a crime when any "person employed in any administrative position by the United States, or by any department or agency thereof, . . . uses his official authority for the purpose of interfering with, or affecting, . . . the election of any candidate for the office of President, Vice President, [or] Presidential elector." Under 18 U.S.C. § 2(a), a President commits a crime by commanding federal personnel to commit an offense under 18 U.S.C. § 595.

Mr. Trump's arguments to immunize a former President's Post-Election Usurpation Crimes, however, would undo the deterrence provided by these federal criminal statutes. A future President would be emboldened to deploy the military and armed federal personnel to (a) prevent the counting of votes in an unfavorable county or of a certain type (such as mail-in ballots) by seizing ballots and voting machines, and (b) bar physically his or her opponent's electors from casting their electoral votes on the day

and in the place required by 3 U.S.C. § 7 and state law. And presidential immunity from federal criminal liability under 18 U.S.C. §§ 1509, 401(3), and 2(a) and (b) would embolden a President to command the military and armed federal agents to "disregard[] this Court's" orders to desist. Pet. Br. 22.

These terrifying possibilities are real. Indeed, after the electors voted on December 14, 2020, there were calls from close allies of former President Trump for him to deploy the military.

Under an executive order dated December 16, 2020, then-President Trump would have "order[ed]" that "the Secretary of Defense shall seize" voting machines and records, including by using federalized National Guard units.[5] The draft order was created by a lawyer assisting Rudy Giuliani in efforts to overturn the 2020 election results.[6]

On December 16, 2020, former General and National Security Advisor Michael Flynn, among others,

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[5] B. Swan, *Read the never-issued Trump order that would have seized voting machines*, POLITICO (Jan. 21, 2022), available at https://www.politico.com/news/2022/01/21/read-the-never-issued-trump-order-that-would-have-seized-voting-machines-527572 (linking to draft order).

[6] B. Swan, *Read the emails showing Trump allies' connections to voting machine seizure push,* POLITICO (Feb. 9, 2022), available at https://www.politico.com/news/2022/02/09/trump-emails-voting-machines-election-00007449 (linking to December 16-17, 2020 emails).

reviewed the draft order. *Id.* On December 17, 2020, the draft order was changed to a presidential direction to the Secretary of Homeland Security to seize the voting machines and records, using National Guard units federalized by the Secretary of Defense. *Id.* Also that day, Mr. Flynn called for then-President Trump to seize voting machines and deploy "military capabilities" to "rerun an election in each of those [swing] states."[7]

In response, on December 18, 2020, the Army's Chief of Staff and Secretary issued a public statement that "[t]here is no role for the U.S. military in determining the outcome of an American election."[8] That day, then-President Trump dispatched the Director of the White House Presidential Personnel Office to inform the Acting Secretary of Defense that the public statement of these Army officials "was entirely unacceptable." Jonathan Karl, TIRED OF WINNING, 131, 133-34 (2023). That evening, then-President Trump met with Flynn, Giuliani, and others for four hours. *Id.* at 134. The next day, according to Trump campaign lawyer Jenna Ellis, the Deputy White House Chief of Staff stated: "[T]he boss is not going to leave

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[7] Michael Flynn to Newsmax TV: *Trump Has Options to Secure Integrity of 2020 Election* (Dec. 17, 2020) (linking to video), available at https://www.newsmax.com/politics/trump-election-flynn-martiallaw/2020/12/17/id/1002139/.

[8] *U.S. Army Rejects Using 'Martial Law' on Election Fraud*, NEWSMAX (Dec. 19, 2020), available at https://www.newsmax.com/newsfront/election-fraud-martial-law-army-no-role/2020/12/19/id/1002337/.

under any circumstances. We are just going to stay in power."[9]

On January 3, 2021, co-conspirator 4, a Justice Department official, discussed potential use of military force. Indictment, ¶ 81. On January 15, 2021, Mike Lindell carried notes into a meeting with then-President Trump that stated "Insurrection Act *now* . . . martial law if necessary."[10] As late as January 17, 2021, Representative Marjorie Taylor Greene texted White House Chief of Staff Mark Meadows that "*several* [House members] are saying the only way to save our Republic is for Trump to call for Marshall [sic] law." *Id.* (emphasis added).[11]

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[9] A. Gardner & H. Bailey, *Ex-Trump allies detail effort to overturn election in Georgia plea videos*, WASHINGTON POST (Nov. 13, 2023), available at https://www.washingtonpost.com/national-security/2023/11/13/trump-georgia-case-videos-overturn-2020-election/ (linking to proffer video).

[10] J. Alemany, J. Dawsey, and T. *Hamburger, Talk of martial law, Insurrection Act draws notice of Jan. 6 Committee*, WASHINGTON POST (Apr. 27, 2022) (emphasis in quoted notes), available at https://www.washingtonpost.com/politics/2022/04/27/talk-martial-law-insurrection-act-draws-notice-jan-6-committee/.

[11] *Accord* H. Walker, J. Komensky and E. Yucel, *Mark Meadows Exchanged Texts with 34 Members of Congress About Plans To Overturn the 2020 Election,* TALKING POINTS MEMO (Dec. 12, 2022) (also quoting Jan. 17 text from Rep. Norman to Meadows), available at https://talkingpointsmemo.com/feature/mark-meadows-exchanged-texts-with-34-members-of-congress-about-plans-to-overturn-the-2020-election.

Moreover, former President Trump's reply brief in the District Court relied on the assertion that during the dispute over the 1876 election, President Grant's "official actions [possibly] were criminal," yet he was not indicted. D. Ct. Doc. 122, at 11-12. The clear import of that discussion is that presidential immunity should bar prosecution of a former President who "trailed greatly in the electoral college" and "dispatched federal troops to states to ensure that" their electoral votes were favorably awarded. *Id.* at 11-13.

Hamilton wrote in Federalist No. 85 that the Constitution sought to prevent a one-time "victorious demagogue" from remaining in power via "military despotism."[12] Adopting Mr. Trump's arguments would encourage Presidents to violate federal criminal statutes by employing the military and other armed federal personnel to overturn presidential election results.

V. REJECTING PRESIDENTIAL IMMUNITY FOR POST-ELECTION USURPATION CRIMES WILL NOT ENABLE IMPROPER PROSECUTIONS.

The D.C. Circuit explained that the elements of a criminal statute and the "ethical obligations" of federal prosecutors restrain improper criminal prosecutions against a former President. J.A. 37-38. The Indictment in this case illustrates those restraints.

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12 THE FEDERALIST NO. 85 (Alexander Hamilton).

First, many of Mr. Trump's challenges to election results took place in courts, where state laws direct such challenges.[13] Mr. Trump and his allies lost approximately 60 court cases brought to overturn his election defeat. *See* John Danforth, *et al.*, *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election,* at 3-5, 14-15, 33-35, 44-46, 51-52, 59-63, 68-69 (July 2022) (citing cases), available at www.lostnotstolen.org. Yet the Indictment mentions only two court filings, both in Georgia. On November 25, 2020, former President Trump retweeted about a lawsuit that contained false accusations of "massive election fraud" in voting machine software and hardware, even though Mr. Trump allegedly had conceded privately that these allegations were unsupported and "crazy." Indictment, ¶ 20. And on December 31, 2020, former President Trump signed a verification of a lawsuit's allegations after a co-conspirator allegedly had acknowledged that Mr. Trump was aware that some of the factual allegations were false. Indictment, ¶ 30. The Indictment thus mentions only those post-election day court challenges that included fraudulent lies about material facts.

Second, the Indictment also shows restraint with respect to out-of-court activities. The Indictment focuses on allegedly knowingly-false factual

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[13] *See, e.g.*, Ariz. R.S. §§ 16-672 to 673, 16-675 to 677; Ga. Code Ann. §§ 21-2-520 to 528; Nev. R.S. §§ 293.407-423; Pa. Const., art. VII, § 13; 25 Pa. Stat. §§ 3291 (Class II), 3351-3352, 3456, 3471, 3473-3474; Wis. Stat. §§ 9.01(1)-(11).

statements, made by Mr. Trump (and his co-conspirators) to state legislators, Department of Justice officials, and then-Vice President Pence—usually person-to-person. These include:

- "205,000 more votes than voters in Pennsylvania;"
- "more than 30,000 non-citizens had voted in Arizona;"
- "voting machines in various contested states had switched votes from [Trump] to Biden;"
- "more than 10,000 dead people voted in Georgia;"
- "thousands of out-of-state voters had cast ballots in Georgia's election;"
- "an illegitimate vote dump in Detroit."

Indictment, ¶¶ 12, 15, 21, 31, 35, 45, 51, 74, 86, 90, 93.

Third, although a congressional committee made a criminal referral about Mr. Trump for violating 18 U.S.C. § 2383, *see* Final Report, Select Comm. to Investigate the January 6th Attack on the United States Capitol, H.R. Rep. No. 117-663, at 109–11 (2022), this Indictment did not contain that charge. A conviction under section 2383 would have disqualified Mr. Trump from every federal office. The absence of a Count under section 2383 demonstrates prosecutorial restraint.

Despite this, Mr. Trump's *amici* ask this Court to create a forever-constitutional rule of presidential

immunity because they assert—incorrectly—that this prosecution is political. *E.g.*, Alabama Amici Br. at 3. Under our Constitution, however, "the Executive Branch—not the Judiciary" decides whom to charge and when. *See United States v. Texas*, 599 U.S. 670, 679 (2023). That such powers, even in a case involving a President, reside in an Executive Branch that is potentially subject to "[p]olitical pressures" reflects the design of Article II, not a flaw. *Morrison v. Olson*, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) (citing "Teapot Dome . . . and Watergate"). "Under our system of government, the primary check against prosecutorial abuse is a political one." *Id.* at 728. The people by election can boot out a President and his or her party if an administration engages in prosecutorial abuse. *Id.* at 728-29. Indeed, as is his right, Mr. Trump frequently campaigns for voters to replace President Biden because of the supposed "weaponization" of the Justice Department. In contrast, if this Court arrogates to itself the executive power of prosecutorial discretion, "*there would be no one accountable to the public to whom the blame could be assigned*." *Id.* at 731 (emphasis in original). That would violate the separation of powers.

CONCLUSION

This Court should affirm.

Dated: April 4, 2024

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICIES

APPENDIX A
AMICI NAMES[14]

Former Members of Congress

Rod Chandler
Barbara Comstock
John Danforth
Mickey Edwards
David F. Emery
Jim Greenwood
John LeBoutillier
Claudine Schneider
Christopher Shays
Peter Smith
Dave Trott

Former Justice Department and White House Officials

Donald Ayer
John Bellinger III
Stuart M. Gerson
John Giraudo
David Hiller
Peter Keisler
J. Michael Luttig
John M. Mitnick
Gregg Nunziata

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[14] *See also* Appendix A to *Amici* Brief of Danforth, et al., Opposing The Application For A Stay (Feb. 13, 2024). The views expressed are solely those of the individual *amici* and not any organization or employer. Reference to a position is solely for identification purposes.

Carter Phillips
Alan Charles Raul
Jonathan Rose
Nicholas Rostow
Robert Shanks
Larry Thompson
Stanley Twardy
Wendell Willkie, II

Former Executive Branch Officials

Ambassador Jeff Bleich
Ambassador Judith Beth Cefkin
Thomas M. Countryman
Ambassador Cindy L. Courville, Ph.D.
Eric Edelman
Edward J. Larson
F. Whitten Peters
Trevor Potter
Paul Rosenzweig
Jack Thomas Tomarchio
Christine Todd Whitman

Retired Military

Rear Admiral Katharine L. Laughton, USN (Ret.)
Major General Randy Manner (Ret.)
Rear Admiral Michael Edward Smith, USN (Ret.)

Other

Richard Bernstein