No. 23-939

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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

BRIEF OF U.S. SENATOR ROGER MARSHALL AND TWENTY-SIX OTHER MEMBERS OF CONGRESS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office.

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INTEREST OF AMICI CURIAE

As members of the federal legislature, the *amici curiae* seek to protect the respective constitutional roles of Congress and the federal judiciary in the manner of impeaching, removing from office, and criminally prosecuting a President for his acts in office. *Amici* have a special interest in upholding the Constitution's separation of powers as well as in ensuring that the Constitution is faithfully interpreted according to the history and context that guided the Framers' carefully chosen language.

Amici include Senator Roger Marshall and twenty-six U.S. Representatives currently serving in the 118th Congress. A full list of the *amici* is listed in the Appendix.[1]

SUMMARY OF ARGUMENT

I. In establishing a system of accountability for a President's acts in office, the Framers were heavily influenced by history. In particular, the Framers were influenced by the example of the Roman Republic and its downfall at the hands of Julius Caesar, with which the Framers would have been familiar as learned men of their time. The Framers were keenly aware of the pitfalls of ancient democracies and republics like Rome, where the political prosecution of Caesar for his official actions ultimately led to the civil war that ended the Roman Republic. The Framers thus would have known that a popular former Executive, threatened by prosecution or disqualification for his official acts, might

[1] No counsel for any party authored this brief, in whole or in part, nor did counsel for any party or either party make a monetary contribution intended to fund this brief in whole or part. No person or entity other than amicus and counsel for amicus contributed monetarily to this brief's preparation or submission.

be a dangerous force against the stability of their new Republic. The Framers understood that safety for the Republic would come not from weakening the presidency but, counterintuitively, by creating a strong Executive that would be accountable to the will of the electorate directly as well as to the elected legislature acting as a check.

II. In view of these historical lessons, the Framers extensively debated the means for creating a strong Executive that would remain politically accountable while also allowing the young Republic to flourish. The Framers ultimately adopted a mechanism of political accountability for an independent presidency by granting the powers of impeachment, removal, and disqualification to Congress and Congress alone. The Framers made subsequent criminal prosecutions in judicial courts available only when a President's conduct resulted in his removal from office by those elected to represent the People.

This structure both ensured that the legislative branch would remain the electorally accountable gatekeeper of presidential prosecutions and secured judicial institutional integrity by circumscribing the judicial role in reviewing the President's official acts to only those cases where Congress had acted first. Not only did these virtues reflect the importance of the judicial power, they were consistent with other constitutional protections, such as the protection against deprivation of life, liberty, or property without due process of law and protections against double jeopardy. These concerns culminated in a final protection, the Impeachment Judgment Clause, which clarifies that impeachment and conviction are a necessary prerequisite for any criminal prosecution to occur.

III. The court of appeals erred by rejecting the petitioner's claim of immunity. The Impeachment Judgment Clause removes any doubt about the proper balance between the elected and unelected branches of government, as it explicitly conditions any prosecution of a former President on conviction following impeachment. This balance is reflected in the twofold purpose served by the Impeachment Judgment Clause, which expressly limits the punishments that may be imposed by the Senate while also requiring that any judicial prosecution be initiated on the precondition of a conviction by the Senate. The court of appeals erred in its interpretation of this constitutional text. Its analysis renders the Framers' express choice to condition prosecution on a conviction meaningless, lacks precedential support, relies on an unavailing comparison to inapposite constitutional text, and cannot be reconciled with the Framers' own statements about the Impeachment Judgment Clause. This Court should thus reject the denial of presidential immunity and reverse the judgment of the court of appeals.

ARGUMENT

The Constitution provides, by both its structure and text, several means for holding a President to account for his acts in office. Foremost among these means—as the Framers knew, and as even the panel below acknowledged—is an appeal to the voters themselves. *United States v. Trump*, 91 F.4th 1173, 1199 (D.C. Cir. 2024). Of all roles in the federal government, the presidential office is the "most democratic and politically accountable." *Id.* (citation omitted). The Framers understood that this powerful political check was the primary and most desirable means for the governed to check and control those

who govern. THE FEDERALIST No. 51, 1788 WL 465, *1 (A. Hamilton or J. Madison); *Madison Debates: July 20*, AVALON PROJECT, available at https://avalon.law.yale.edu/18th_century/debates_720.asp (last visited March 19, 2024) (statements of R. King). Thus, they intended that intervention in the maladministration or misdeeds of the President was vested primarily in the font of all governmental authority: the governed citizens and the power of their votes. *Madison Debates: July 19*, AVALON PROJECT, available at https://avalon.law.yale.edu/18th_century/debates_719.asp (last visited March 19, 2024) (statement of G. Morris).

The Framers provided a fallback option for the unusual circumstances where direct political accountability would not suffice: impeachment. Informed by past unfortunate chapters in ancient history, the Framers guarded against despotism by creating an impeachment power and entrusting it to Congress, and Congress alone. And so, the text of the Constitution, which they trusted would be "a rising and not a setting Sun," *Madison Debates: September 17*, AVALON PROJECT, available at https://avalon.law.yale.edu/18th_century/debates_917.asp (last visited March 19, 2024) (statement of B. Franklin), empowers Congress to impeach a President and, in the rare case where such impeachment gathers broad support, to thereby expose a removed President to subsequent prosecution.

Only after impeachment and removal does the third option, criminal prosecution, become available. There is no shortcut. A robust, independent Executive, checked first by the people and second by their representatives, provided security while allowing a strong presidency that would enable the nation to flourish. The alternative—where a current or former President could be

subject to criminal prosecution by either his subordinates (for a current President subject to federal charges), his successor and likely opponent's subordinates (for a former President subject to federal charges), or local prosecutors subject to parochial interests (for state charges)—intolerably undermines the Constitution's only true nationwide office. The court of appeals erred in holding otherwise.

I. The Framers Were Influenced by History, Especially the Fall of the Roman Republic.

The risks to representative government posed by political prosecutions have been much discussed. As the petitioner has correctly argued, interference with a democratically accountable Executive by nondemocratic branches threatens the presidency itself. Pet. 26-28. Uninhibited prosecutorial and judicial interference with executive mechanisms and decisions could hamstring the President for fear of political retribution and constant litigation. The court of appeals dismissed this risk as "slight." *Trump*, 91 F.4th at 1197. The Framers would have disagreed. As scholars of history, the Framers knew what lessons antiquity had to offer regarding the risks that political prosecutions posed to representative government.

A. The Framers were keenly aware of the histories of the ancient democracies and republics and the pitfalls into which those societies and their governments descended, Rome in particular. *See generally* John P. Murphy, *Rome at the Constitutional Convention*, 51 CLASSICAL OUTLOOK 112 (1974). *See also* Arthur Schlesinger, *America: Experiment or Destiny?*, 82 AM. HIST. REV. 505, 507-08 (1977); THE FEDERALIST No. 34, 1788 WL 448, at *1 (A. Hamilton). After all, the Framers modeled

their government on ancient principles reinvigorated by the Enlightenment. Schlesinger, *America*, *supra*, at 507-08; Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1095-1101 (2004). Of particular significance was the example set by the late Roman Republic and the initiation of its demise at the hands of Julius Caesar.

After his first consulship, Caesar faced both the threat and reality of prosecution at the hands of his political rivals—rivals who feared Caesar would only continue to grow in power. Russ VerSteeg, *Law and Justice in Caesar's Gallic Wars*, 33 HOFSTRA L. REV. 571, 578 (2004). Those rivals indicted Caesar for his actions as consul as he was preparing to leave Rome and take proconsular command of Gaul. *Id.* at 578-79. Caesar spent nearly ten years in Gaul, protected by the immunity granted him under Roman law as governor and by virtue of the authority derived from his military command. Gregory S. Butcher, *Caesar: the View from Rome*, CLASSICAL OUTLOOK, Spring 2011, at 83.

As his time away from Rome drew to a close, Caesar again faced the threat of prosecution by his political enemies, who wanted to prevent Ceasar from holding further office by bringing additional charges for his conduct in Gaul. VerSteeg, *Law and Justice*, *supra*, at 579. But Caesar knew he was still legally eligible for another term as consul, a term that would provide him with further magisterial immunity and the possibility of another long proconsulship to follow. *Id.*; Butcher, *Caesar*, *supra*, at 83.

Two technicalities of Roman law, however, stood to foil his plan and expose him to deposition by his rivals. First, he was required to be present in Rome to stand for election as consul. Butcher, *Caesar*, *supra*, at 83. But,

second, he also knew that the moment he crossed the "sacred boundary of the city of Rome" his authority, including his immunity, would lapse. *Id.* Ultimately, though he sought dispensation to run for office *in absentia*, the senate refused and passed a law requiring him to dismiss his legions and enter the city as a private citizen. VerSteeg, *Law and Justice*, *supra*, at 580, 580 n.47.

By this point, Caesar faced liability for the legality of his actions a decade earlier as consul, and his rivals wished to further prosecute him for actions he took in Gaul, and, importantly, they publicly questioned whether he could legally stand for election again at all. *Id.* at 581. So, faced with the decision to submit to prosecution by his political enemies, Caesar refused, marched on Rome, initiated a civil war, and ushered in the age of the principate. *See id.* Thus, the Roman Republic fell, and the Empire was born. Later, Caesar was reported as saying "[t]hey made this happen; they drove me to it. If I had dismissed my army, I, Gaius Ceasar, after all my victories, would have been condemned in their law courts." *Id.*

B. The lessons of ancient Rome were not lost on the Framers at the Constitutional Convention. After all, "knowledge of classical authors was universal among colonists with any degree of education." BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 23 (1972). Benjamin Franklin, for example, referenced Cicero and Cato in his writings. *See generally* BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 86 (1793). The *Federalist Papers* expressly referenced the governments of antiquity, and the Roman Senate specifically. THE FEDERALIST No. 63, 1788 WL 477, *5 (A. Hamilton or J. Madison). And as Thomas Paine famously wrote of independence in 1776, countering pro-reconciliation responses to his influential

revolutionary pamphlet *Common Sense*, "The Rubicon is past." 1 THE WRITINGS OF THOMAS PAINE 118 (Moncure Daniel Conway ed., 1894). Paine would reference Caesar again after the Revolution, noting that "'[t]he Rubicon is past' was once given as a reason for prosecuting the most expensive war that England ever knew." THOMAS PAINE, PROSPECTS ON THE RUBICON 1 (1787).

Contemporaneous sources described the Roman Republic's experience with Caesar in terms similarly applicable to the Framers' conundrum regarding possible approaches to presidential power:

> [E]very resolution which the friends of the republic could take was beset with danger . . . . To leave Caesar in possession of his army, and to admit him with such a force to the head of the commonwealth, was to submit, without a struggle, to the dominion he meant to assume. To persist in confining him to one or other of these advantages, was to furnish him with a pretence to make war on the republic.

3 ADAM FERGUSON, THE HISTORY OF THE PROGRESS AND TERMINATION OF THE ROMAN REPUBLIC 265 (1799). The Framers thus would have known that a popular former President, threatened with prosecution or disqualification for his official acts, might be the most dangerous force against the stability of their own new constitutional Republic. They knew that they would have to account for safeguards against the tyranny that Caesar wrought against the Roman Republic: namely, a measure of insulation of the office and its former holders against abusive, politically motivated prosecution or disqualification.

During the Constitutional Convention, Gouverneur Morris explained why restricting Presidents to a single

term would promote tyranny—as he put it, "[s]hut the Civil road to Glory & he [the President] may be compelled to seek it by the sword." *Madison Debates: July 19*, AVALON PROJECT, available at https://avalon.law.yale.edu/18th_century/debates_719.asp (last visited March 19, 2024). As Hamilton said, "[e]stablish a weak government and you must at times overstep the bounds. Rome was obliged to create dictators." *Notes of the Secret Debates of the Federal Convention of 1787*, Taken by the Late Hon. Robert Yates, Chief Justice of the State of New York, and One of the Delegates from That State to the Said Convention, at June 19, 1787, available at https://avalon.law.yale.edu/18th_century/yates.asp (last visited March 19, 2024).

The Framers knew that, much like a cornered animal will become aggressive, a vulnerable President would be tempted to overstep his authority to protect himself, as Caesar did. As Benjamin Franklin pointed out, impeachment promised to replace assassination as the means for a nation to relieve itself of a tyrannical magistrate. *Madison Debates: July 20*, AVALON PROJECT, available at https://avalon.law.yale.edu/18th_century/debates_720.asp (last visited March 19, 2024). And while impeachment may have replaced the threat of physical assassination, the Framers would have understood that incentives for presidential rivals to strike other political or legal blows would still remain.

The Framers thus understood that the balance of power between the political branches of government and, counterintuitively, the strength of the presidency would keep the new Republic safe. They knew that neither weakening the presidency nor providing for prosecution of Presidents in the courts of law would guard against a tragedy like that which befell the Roman Republic.

Rather, the will of the people—and the ability of the people to elect legislative officials who could oppose a President—was intended to restrain an Executive whose acts had transgressed the boundaries the people set for him. The "great security against a gradual concentration of the several powers in the same department" would "consist[] in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." THE FEDERALIST No. 51, 1788 WL 465, *1 (A. Hamilton or J. Madison). "Ambition [would] be made to counteract ambition," with "opposite and rival interests" advanced in republican government. *Id.*

II. In View of This History, the Framers Granted the Impeachment Power to Congress Alone and Insulated the President from the Judiciary.

With these historical lessons in mind, the Framers faced important choices about the allocation of power in the Constitution. After much debate, the Framers ultimately adopted a mechanism of political accountability of an independent presidency by granting the powers of impeachment, removal, and disqualification to Congress's hands, and they made subsequent criminal prosecutions available only when a President's conduct resulted in his removal from office by those elected to represent the body politic for that purpose.

Keeping the oversight and punishment of Presidents in the legislative branch and making that branch the gatekeeper of presidential prosecutions both preserves the institutional integrity of the courts and their officers and reduces the likelihood of civil unrest that the exercise of less-than-democratic powers may promote. Most importantly, this balance "oblige[d the government] to

control itself," *id.*, rather than relying on *post hoc* prosecution by political rivals for official acts to serve as a check on power.

A. To safeguard the Republic and undergird the voting power of the people, the Framers included an impeachment mechanism in their new Constitution. That mechanism was designed for those instances in which electoral consequences fail and in which presidential misconduct so violates the fiduciary trust reposed in the office as to warrant intervention. But it was uncertain for much of the Constitutional Convention whether the Framers would include an impeachment power in their plan and the extent to which that power would be entrusted to a politically accountable branch of government. That question in turn implicated a greater debate regarding the relative strength of the executive and the legislative branches of government. *See* William E. Nelson, *Reason and Compromise in the Establishment of the Federal Constitution, 1787-1801*, 44 WM. & MARY Q. 458, 469-70 (1989). Central to this debate was the degree of independence that the President should enjoy from Congress. *Id.*

The debate on this point was substantial. For example, Hamilton, proposing a strong executive magistrate, said that "we ought to go as far in order to attain stability and permanency, as republican principles will admit." *Madison Debates: June 18*, AVALON PROJECT, available at https://avalon.law.yale.edu/18th_century/debates_618.asp (last visited March 19, 2024). On the other hand, Hugh Williamson, in calling for the division of executive power, objected on the basis that "a single Magistrate . . . will be an elective King, and will feel the spirit of one." *Madison Debates: July 24*, AVALON PROJECT, available at

https://avalon.law.yale.edu/18th_century/debates_724.asp (last visited March 19, 2024). After much debate and compromise, the Convention chose not to expose the strong Executive they had created to interference from the least democratic branch of government—the courts. Nelson, *Reason and Compromise*, *supra*, at 469-70. Instead, the Framers kept oversight of the Executive closer to the font of power (the people) and in closer balance with the authority of Congress. They rested charging authority in the people's representatives, U.S. Const. art. I, § 2, cl. 5, and the authority to convict and punish in the States' representatives, *id.* art. 1, § 3, cl. 6.

This history informs some of the reluctance to subject executive officials to legislative or judicial interference to this day. *See, e.g.*, *Trump*, 91 F.4th at 1197. Under the Take Care Clause, courts afford executive actors a presumption of regularity and "presume that they ... properly discharge[ ] their official duties." *Id.* (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)). This presumption appropriately reflects the strong Executive Hamilton, Madison, Morris, and others intended. The Framers ultimately settled on creating an independent Executive while concomitantly authorizing an impeachment power to be exercised by Congress alone. At a minimum, the extensive debate over whether to have an impeachment power suggests that the Framers understood that subjecting a former President acquitted by the Senate to the threat of further sanction for his official acts could threaten strength of the Executive.

B. Moreover, the Framers knew that the judiciary was ill-suited to holding the President personally accountable for his official acts. As Hamilton said, "it is still more to be doubted, whether [the Justices of the Supreme Court] would possess the degree of credit and

authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives." THE FEDERALIST No. 65, 1788 WL 479, *2 (A. Hamilton). In other words, the people would be more receptive to either the conviction a popular President or the acquittal of an unpopular one if that result came from a government actor more representative of the people than the courts. *See id.*

Thus, the Framers placed constitutional authority for an intragovernmental check within the sole power of the legislature, the branch respected in our Republic as first among peers and whose "authority necessarily predominates," THE FEDERALIST No. 51, 1788 WL 465, *2 (A. Hamilton or J. Madison), to correct "the misconduct of public men" and "the abuse or violation of some public trust," THE FEDERALIST No. 65, 1788 WL 479, *1 (A. Hamilton). Not only did this protect the executive magistrate from forces that were not politically accountable, it protected the judiciary from political meddling or influence, and therefore protected the courts from institutional erosion.

The Framers also knew, however, that the authority to remove an official from his post and to bar him from further service should be separated from the power to deprive him life, liberty, or property. Unlike the House of Lords, the Senate had not been authorized to mete out criminal punishment. *See* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 67 (1973) (explaining the English practice authorizing the House of Lords to impose a full range of criminal penalties, including, fines, imprisonment, and death). Therefore, the Constitution specifies that, upon conviction, the Senate could impose only the former punishment—the dispossession

of the convicted of his post and his fame. U.S. Const. art I, § 3, cl. 7; THE FEDERALIST No. 65, 1788 WL 479, *2 (A. Hamilton). And it clarifies that the authority to impose the latter, criminal punishments resides, of course, in the judicial branch "according to law." U.S. Const. art I, § 3, cl. 7. After all, to deprive a citizen of life, liberty, or property "without due process of law," as administered in the independent courts, would run against all that the Framers had sought to accomplish through their new form of government. *See id.* art. III, § 1; *id.* amend. V.

There was another practical reason for the limitation on impeachment punishments. The Framers feared depriving an impeached individual "the double security intended them by a double trial." THE FEDERALIST No. 65, 1788 WL 479, *2 (A. Hamilton). It would not "be proper that the persons who had disposed of his fame, and his most valuable rights as a citizen in one trial, should, in another trial, for the same offense, be also the disposers of his life and his fortune[.]" *Id.* So providing separate trials, one for political dispossession of office and a subsequent one for criminal prosecution under law, provides the necessary protection to the convicted President, a particular citizen who stands in violation of the public trust. This dual mechanism gives the President a protection for his civil service that is proportionate to the weight of his responsibility and enables the execution of his duty without fear.

Finally, to protect the President yet further, and to grant the Executive the liberty to execute his duties free from interference from all except the people's representatives in the legislature, the Framers took one final step. As explained further below, the Constitution's text and the context surrounding it show that impeachment and conviction are a necessary prerequisite before any

"Indictment, Trial, Judgment and Punishment, according to Law" can occur. The Framers opened the door for prosecution within the judicial branch only for those Presidents who have been deemed unfit for continued service by the representatives of the governed. They did so for the protection of both the presidential office and its holder. And given the stark example of Roman history, they did so because they were aware of what could transpire without such protections.

III. The Court of Appeals Erred by Denying Former President Trump Presidential Immunity.

The Framers carefully drafted the Constitution's text to reflect the historical and policy considerations discussed above. Specifically, to remove any doubt about the proper balance between the elected and unelected branches of government, the Framers explicitly drafted an Impeachment Judgment Clause to condition any prosecution of a former President on *conviction* following impeachment. *See* U.S. Const. art. I, § 3, cl. 7. Because the court of appeals' analysis is inconsistent with the Constitution's text governing prosecution following impeachment, it must be rejected.

A. The Framers clearly set forth the procedure for impeachment, conviction, and the subsequent prosecution of a President. First, the Constitution provides that the President is subject to impeachment, conviction, and removal for "Treason, Bribery, or other high Crimes and Misdemeanors." *Id.* art. II, § 4. It reposes the power to impeach in the House of Representatives. *Id.* art. I, § 2, cl. 5. It assigns to the Senate the power to try impeachments and provides some procedures for doing so. *Id.* art I, § 3, cl. 6. And finally, it sets forth the following:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Id. art. I, § 3, cl. 7.

The Impeachment Judgment Clause thus contains two constitutional rules. First, as discussed above, it limits the punishments that the Senate may impose upon conviction. And second, it provides that "the Party *convicted* shall nevertheless be [criminally] liable . . . according to law." *Id.* (emphasis added). This second rule necessarily implies that a President *acquitted* by the Senate would not be so liable. But it also clarifies that the double-jeopardy bar is not triggered by conviction in the senate.

B. The court of appeals erred in its interpretation of the Constitution's text, and specifically the Impeachment Judgment Clause. It misconstrued the Framers' intent and the historical context that informed the Framers' decisions and drafting. In its opinion, the D.C. Circuit introduced the relevant clause as "preserv[ing] the option of criminal prosecution of an *impeached* official." *Trump*, 91 F.4th at 1200 (emphasis added). This characterization of the Constitution is materially imprecise—by its terms, the Constitution can only be said to preserve the option of criminal prosecution of a *convicted* official, at least for official acts. This latter reading is supported by the history of both the ancient democracies and republics and the framing of the Constitution,

discussed above. The court of appeals' rejection of it is flawed in several ways.

First, the lower court's reading of the text renders the phrase "the Party *convicted*" meaningless. This violates one of the most fundamental and sacrosanct canons of construction. Under this "cardinal principle," courts interpret laws so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks and citation omitted). The Framers chose that phrase to mean that the following clause would only apply to officers convicted by the Senate. The D.C. Circuit's interpretation, on the other hand, renders the phrase surplusage, at best. Yet it is axiomatic that every word should be given operative effect according to its meaning. *See Sester v. United States*, 566 U.S. 231, 239 (2012). Indeed, "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). If the Framers had meant for any President, impeached, convicted, or otherwise, to be "[criminally] liable" for official acts, they would have used different words to convey that precise meaning.

Second, the court of appeals' atextual interpretation lacks precedential support. The court of appeals relied on a handful of circuit-court cases involving bribery prosecutions of judges. *Trump*, 91 F.4th at 1194. Arguably, *United States v. Claiborne*, 727 F.2d 842 (9th Cir. 1984), *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), and *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974), may have *some* persuasive value. But the court of appeals placed far too much weight on those cases as vitiating presidential immunity. None of those judicial-bribery cases involved members of the executive branch,

let alone the President about whom the Framers debated extensively and to whom they granted a position of unique strength under the Constitution. Although those cases involved official conduct, it is not clear whether any of the defendants argued that their immunity extended *only* to official acts, as does President Trump. And none of those cases engaged in any analysis of the "historical background of the pertinent constitutional provisions," as, according to those courts, "[a]ny reexamination of th[at] esoteric subject . . . would serve no good purpose." *Isaacs*, 493 F.2d at 1141-42. Viewed properly, *Isaacs* and its progeny do not foreclose presidential immunity.

Third, the D.C. Circuit dismissed the argument for immunity based on the Impeachment Judgment Clause as "denying the antecedent" and, in doing so, rested on an inapt comparison to the Speech or Debate clause. *Trump*, 91 F.4th at 1201-02 (quoting *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 589 (2014) (Scalia, J., concurring)). Under the Speech or Debate clause, the Constitution provides that "for any Speech or Debate in either House," the Senators and Representatives "shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The court of appeals reasoned from this text that the Framers knew how to grant immunity from prosecution expressly, but that they did not do so for acquitted Presidents. *Trump*, 91 F.4th at 1201. The Speech or Debate clause, however, is not as explicit as the court of appeals suggested. It merely says that "for any Speech or Debate in either House, [Congressmen] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. That text does not expressly define what it means to be "questioned," what qualifies as "Speech or Debate," or what it means to be "*in* either House." *Id.* The court of appeals construed the Speech or Debate clause to "explicitly

grant criminal immunity." *Trump*, 91 F.4th at 1201. But this Constitutional provision clearly requires interpretation informed by historical context, just as the Impeachment Judgment Clause does.

In addition, the D.C. Circuit erroneously parsed the Constitution based on misplaced emphasis on the word "nevertheless" within the Impeachment Judgment Clause. According to the court of appeals, the "Impeachment Judgment Clause contains no words that limit criminal liability—and, to the contrary, it uses 'nevertheless' to ensure that liability will *not* be limited (*i.e.*, 'hindered or obstructed'), even after an official is impeached, convicted and removed from office." That word was included to clearly express that "the Party *convicted*" can be tried in the courts of law notwithstanding concerns about double jeopardy. U.S. Const. art. I, § 3, cl. 7. It relieves the double jeopardy concerns, but it does not inform to whom criminal liability may apply.

Fourth, the court of appeals' analysis cannot be reconciled with the Framers' own statements about the Impeachment Judgment Clause. Alexander Hamilton explained that a President "would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; *and would afterwards be liable* to prosecution and punishment in the ordinary course of law." *Trump*, 91 F.4th at 1202-03 (quoting THE FEDERALIST No. 69, 1788 WL 483, at *1 (A. Hamilton)) (emphasis added). Rather than consider the word "afterwards" or meaningfully engage with its meaning, the court of appeals simply "th[ought] the more significant word . . . is 'liable.'" The court of appeals took the exact same tack when dealing with Hamilton's statement that a President is subject to "to forfeiture of life and estate

by *subsequent* prosecution in the common course of law." *Id.* at 1203 n.10 (quoting THE FEDERALIST No. 77, 1788 WL 491, at *4 (A. Hamilton)) (emphasis the court's). The court simply ignored Hamilton's wording or considered it surplusage in his explanation of the impeachment powers.

Unsurprisingly, then, the court of appeals misconstrued the Constitution's text in view of the Framers' original understanding. According to the court of appeals, "[i]t strains credulity that Hamilton would have endorsed a reading of the Impeachment Judgment Clause that shields Presidents from all criminal accountability unless they are first impeached and convicted by the Congress." *Id.* at 1203.

It does not, however, "strain[] credulity" to suggest that Hamilton—possibly the most outspoken and extreme proponent of a strong Executive—would have endorsed conviction by the Senate as a prerequisite to prosecution of former Presidents in the courts. True, Hamilton desired that the President not be "sacred and inviolable," like the king of Great Britain. *See id.* (quoting THE FEDERALIST No. 69, 1788 WL 483, at *1 (A. Hamilton)). But Hamilton explained that it was primarily *impeachment* that made the President dissimilar from princely figures and subject to the rule of law. THE FEDERALIST No. 69, 1788 WL 483, at *1 (A. Hamilton). Thus, interpreting the Impeachment Judgment Clause consistently with presidential immunity follows the views expressed by Hamilton.

* * *

The Framers' clear intent was to create a strong national Executive "with sufficient vigor to pervade every part of [the Union]" so that he could "be the guardian of

the people, even of the lower classes, ag[ainst] Legislative tyranny, against the Great [and] the wealthy who in the course of things will necessarily compose the Legislative body." *Madison Debates: July 19*, AVALON PROJECT, available at https://avalon.law.yale.edu/18th_century/debates_719.asp (last visited March 19, 2024) (statement of G. Morris). Therefore, they felt it necessary to rely on electoral accountability of a democratically elected President as the primary check on the chief executive. They also felt it necessary to insulate the presidency (and thereby the executive branch at large) from political persecution to protect the nation from despotism. Whatever one may think of former consuls or former Presidents, a constitutional system cannot long survive placing its chief executive—who is currently campaigning to be re-elected to office in the presidential election just months away—in peril for taking official acts while in office. This Court should not countenance the court of appeals doing so.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 2024

TABLE OF APPENDICES

APPENDIX

LIST OF *AMICI CURIAE* MEMBERS OF CONGRESS

One U.S. Senator

Sen. Roger Marshall.

Twenty-six U.S. Representatives

Rep. Jim Banks.

Rep. Lauren Boebert.

Rep. Eric Burlison.

Rep. Eli Crane.

Rep. Byron Donalds.

Rep. Brad Finstad.

Rep. Michelle Fischbach.

Rep. Chuck Fleischmann.

Rep. Bob Good.

Rep. Lance Goodman.

Rep. Paul A. Gosar D.D.S.

Rep. Marjorie Taylor Greene.

Rep. Diana Harshbarger.

Rep. Wesley Hunt.

Rep. Mike Kelly.

Rep. Anna Paulina Luna.

Rep. Lisa McClain.

Rep. Mary Miller.

Rep. Barry Moore.

Rep. Andy Ogles.

Rep. John Rose.

Rep. Keith Self.

Rep. Glenn "GT" Thompson.

Rep. William Timmons.

Rep. Andrew S. Clyde.

Rep. Ronny Jackson.