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 *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization that since 1920 has sought to protect the civil liberties of all Americans. The ACLU of the District of Columbia is the ACLU's Washington, D.C. affiliate. Amici have frequently appeared in this Court, as counsel and amici, in cases raising significant questions about the meaning of the Constitution, its limitations on government and executive power, and the breadth of rights it grants. The ACLU and the ACLU of the District of Columbia have participated as counsel for parties before the Court or amici in many of the Court's cases concerning presidential immunity. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683 (1974) (amicus); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (counsel); *Clinton v. Jones*, 520 U.S. 681 (1997) (amicus); *Trump v. Vance*, 140 S. Ct. 2412 (2020) (amicus).

SUMMARY OF ARGUMENT

In this case, the former President seeks the power to engage in criminal activity and forever evade the accountability that all others must face. At root, it concerns nothing less than whether the United States is a government of laws in which all citizens, including the President, are subject to the nation's criminal laws, or one in which the President stands immune from criminal prosecution even for blatantly criminal conduct, and even after leaving office.

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[1] Amici affirm that no counsel for any party authored this brief in whole or in part and that no person other than amici made a monetary contribution to its preparation or submission.

No President before Trump has made the argument that former Presidents are absolutely immune from criminal liability even after they leave office; in fact, it has long been presumed that while prosecuting a sitting President may be barred, prosecution after he leaves office is permitted. Indeed, at his second impeachment trial, even former President Trump himself adverted to the possibility of the criminal prosecution of a former President. He was correct then as a matter of law, logic, and history.

Because there are few propositions more dangerous in a constitutional democracy than the notion that an elected head of state is above the criminal law, the Court should reject President Trump's extraordinary assertion that he stands immune from criminal prosecution even if he violated our nation's criminal laws.

ARGUMENT

I. THE CONSTITUTION'S TEXT, HISTORY, AND STRUCTURE DO NOT SUPPORT ABSOLUTE IMMUNITY FROM CRIMINAL LIABILITY FOR FORMER PRESIDENTS.

The President's assertion of absolute immunity from criminal prosecution for his official acts—no matter how heinous they are—is not supported by the separation of powers or the Constitution's text or history. On the contrary, the separation of powers, and the rule of law on which it depends, would be undermined if Presidents were above criminal accountability.

From the Founding to former President Trump's own second impeachment trial, it has been

widely understood that the President is amenable to criminal prosecution after he leaves office. That understanding is firmly grounded in this Nation's most fundamental principles, as well as the specific constitutional structure that the Framers chose to implement those principles.

A. The President is a citizen, not a King.

As Justice Brandeis explained almost a century ago, "[t]he doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). Its "purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Id.*

The former President's assertion of absolute immunity from federal criminal prosecution finds no support at all in the Constitution's text. While the Constitution carefully provides certain immunities, it provides none for the Nation's chief executive. *See, e.g.*, U.S. Const. art. I, § 6, cl. 1 (guaranteeing congressmembers' privileges and immunities). And the Framers decided not to provide such immunity for the President notwithstanding a backdrop of state constitutions that "supplied express privileges" and "immunities" for governors. Saikrishna Bangalore Prakash, *Prosecuting and Punishing Our Presidents*, 100 Tex. L. Rev. 55, 69 (2021) (discussing the Virginia and Delaware constitutions).

As former Solicitor General Robert H. Bork put it, "[s]ince the Framers knew how to, and did, spell out immunity, the natural inference is that no immunity

exists where none is mentioned." Memorandum for the United States Concerning Vice President's Claim of Constitutional Immunity at 5, *In re Proceedings of the Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew*, Civil No. 73-965 (D. Md. Oct. 5, 1973) (concerning the Vice President's claim of constitutional immunity) (cited in Raoul Berger, *The President, Congress, and the Courts*, 83 Yale L.J. 1111, 1125 (1974)); *see* Pet. App. 43–44. "The Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. This silence cannot be ascribed to oversight." *Nixon v. Sirica*, 487 F.2d 700, 711 (D.C. Cir. 1973); *see also Trump v. Vance*, 140 S. Ct. 2412, 2434 (2020) (Thomas, J., dissenting) ("The text of the Constitution explicitly addresses the privileges of some federal officials, but it does not afford the President absolute immunity.").

The President's accountability to the law is an integral part of the separation of powers and the rule of law. If the President is free, as counsel for the former President argued below, to order the assassination of his political opponents and escape all criminal accountability even after he leaves office,[2] both of these fundamental principles of our system would have a fatal Achilles' heel. As the Court has long recognized, "[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, 261 (1882). "That principle

[2] Oral Argument at 8:08–10:42, *United States v. Trump*, No. 23-3228 (D.C. Cir. Jan. 9, 2024), *available at* https://www.c-span.org/video/?532581-1/district-columbia-circuit-court-oral-arguments-president-trumps-immunity-claims.

applies, of course, to a President." *Vance*, 140 S. Ct. at 2432 (Kavanaugh, J., concurring in the judgment). "He is not above the law's commands"; "[s]overeignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen." *Sirica*, 487 F.2d at 711; *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring) ("With all its defects, delays and inconveniences, men 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.").

The principle that no one is above the law, which has been with us "[s]ince the earliest days of the Republic," *Vance*, 140 S. Ct. at 2420 (majority opinion), informed the Court's decision to hold the former President, like any other citizen, to his obligation to produce relevant evidence in a criminal proceeding—even one investigating the former President himself, and even while the President was in office. While safeguards that acknowledge the special nature of the office are appropriate, immunity from process, the Court ruled, is not. And the Court's cases affirming even a sitting President's obligation to respond to criminal subpoenas in cases investigating their own acts would make little sense if the President—after *leaving* office—were absolutely immune to the criminal charges that might follow such an investigation.

More than 200 years ago, Chief Justice Marshall upheld a subpoena *duces tecum* to President Jefferson in connection with the prosecution of Aaron Burr. *United States v. Burr*, 25 F. Cas. 30 (C.C. Va. 1807) (No. 14,692D); *see Vance*, 140 S. Ct. at 2421–23

(discussing *Burr*). Jefferson resisted the subpoena for evidence, but Chief Justice Marshall rejected his argument. Unlike the King, Marshall explained, the President "does not 'stand exempt from the general provisions of the constitution.'" *Vance*, 140 S. Ct. at 2422 (quoting *Burr*, 25 F. Cas. at 34). "In the two centuries since the Burr trial, successive Presidents"—including Monroe, Grant, Ford, Carter, and Clinton—"have accepted Marshall's ruling that the Chief Executive is subject to subpoena." *Vance*, 140 S. Ct. at 2423; *see also Clinton*, 520 U.S. at 703–05.

Most famously, the Court unanimously rejected President Nixon's claim of absolute privilege in response to a subpoena *duces tecum* from the Watergate Special Prosecutor seeking designated recordings of Oval Office conversations that were deemed material to an ongoing grand jury investigation. *United States v. Nixon*, 418 U.S. 683 (1974). While the case specifically addressed a criminal subpoena issued to President Nixon, the Court reaffirmed the broad principle that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." *Id.* At 706.

More recently, this Court held that former President Trump himself, while he was the sitting President, was not immune from a subpoena in connection with a state criminal process. *Vance*, 140 S. Ct. at 2425–29.

It is thus firmly established as a matter of both principle and practice that the President is not

immune from criminal judicial process—even when the sitting President is the target.

B. It has long been understood, including by Presidents themselves, that Presidents could be held criminally liable for their official acts after leaving office.

The absolute immunity former President Trump seeks is not only unsupported by the text or history of the Constitution, and contrary to the separation of powers. It also contravenes a long history of Presidents acknowledging that they could be held criminally liable after leaving office—up to and including Trump himself, until he actually faced indictment.

In 1867, before this Court, Attorney General Stanbery conceded that while President Andrew Johnson was "above the process of any court or the jurisdiction of any court to bring him to account as President," he could be held to account after he was no longer in office. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 484 (1866). When "he no longer stands as the representative of the government," Stanbery said, "then for any wrong he has done to any individual, for any murder or any crime of any sort which he has committed as President, then . . . can he be subjected to the jurisdiction of the courts." *Id.* at 485. At that point, "it is the individual they deal with, not the representative of the people." *Id.*

Almost a century later, President Ford explained his pardon of President Nixon as necessary to spare the country from what would have been years of contentious criminal proceedings—an argument premised on the absence of absolute immunity in the

absence of a pardon. Remarks on Signing a Proclamation Granting Pardon to Richard Nixon, 2 Pub. Papers 101 (Sept. 8, 1974), 1974 WL 425023. President Clinton, too, worried about potentially facing criminal charges after leaving office, and agreed to a settlement with the Independent Counsel to avoid that prospect. Pet. App. at 33.

Most recently, former President Trump has twice endorsed the view that former Presidents could be criminally prosecuted. In *Vance*, then-President Trump "concede[d]—consistent with the position of the Department of Justice—that state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term." 140 S. Ct. at 2426–27. And, during his second impeachment trial, he argued that the proper avenue for "investigation, prosecution, and punishment" in connection with his alleged efforts to subvert the results of the election would be "the [A]rticle III courts," with their "judicial process" and "investigative process . . . *to which no former officeholder is immune*." 167 Cong. Rec. S607 (daily ed. Feb. 9, 2021) (emphasis added) (quoting Trump's counsel); *see also id.* at S693 (daily ed. Feb. 12, 2021) ("[T]he text of the Constitution . . . makes very clear that a former President is subject to criminal sanction after his Presidency for any illegal acts he commits.") (quoting Trump's counsel).[3]

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[3] As a result, the President might be judicially estopped from asserting the contrary proposition now. *See* 18 *Moore's Federal Practice* § 134.30, p. 134–62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4477, p. 782 (1981)

The Executive Branch more broadly has also consistently held this view. The Office of Legal Counsel, which has long taken the position that Presidents cannot be subject to criminal trial *while in office*, has justified that position by asserting that the immunity ends upon their leaving office. *See* Robert G. Dixon, Jr., Ass't Att'y Gen., Office of Legal Counsel, *Re: Amenability of the President, Vice-President, and Other Civil Officers for Federal Criminal Prosecution While in Office* at 29 (Sept. 24, 1973) (entertaining the possibility that after the indictment of a sitting President, "further proceedings" could be stayed "until he is no longer in office"), *available at* https://perma.cc/UY8U-FRZT; A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 259, 2000 WL 33711291, at *28 (Oct. 16, 2000) (assuming that a former President "would need to defend himself" against a stayed indictment "after leaving office").[4]

("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory"); *see also New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001).

President Trump himself has argued, in a different case, that estoppel should apply to prior impeachment proceedings. *See Thompson v. Trump*, 590 F. Supp. 3d 46, 87–90 (D.D.C. 2022).

[4] In 2010, the Office of Legal Counsel analyzed whether the intentional killing of a U.S. citizen in Yemen, as ordered by the President, would violate the Constitution and the foreign murder statute, 18 U.S.C. § 1119, without even suggesting that President Obama would be immune from criminal charges after leaving office. *See* David Barron, Acting Ass't Att'y Gen., *Memorandum for the Attorney General: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against*

Former President Trump now asks this Court to depart from this uniform consensus, a consensus view he himself previously asserted in attempting to evade legal process while in office and impeachment after he left. He relies instead on "a 234-year unbroken tradition of not prosecuting former Presidents for their official acts, despite ample motive and opportunity to do so." Pet. Br. 22 (emphasis omitted). But the absence of evidence is not evidence of absence. Trump cites no instance in which any official took the position he now advances, namely that Presidents *cannot* be held criminally liable for crimes they commit as President, even after leaving office.

The former President also places great weight on an isolated passage taken out of context from *Marbury v. Madison*, in which Chief Justice Marshall remarked that the official acts of the President "can never be examinable by the courts." 5 U.S. (1 Cranch) 137, 166 (1803) (discussed at Pet. Br. 3, 9, 11, 14, 30). But the court below properly rejected his argument. Pet. App. 20–22. In that passage, the Chief Justice specifically addressed only a subset of official presidential acts: the exercise of "certain important political powers" to be used in the President's "own discretion," and for which the President is "accountable only to his country in his political character, and to his own conscience." *Marbury*, 5 U.S. (1 Cranch) at 165–66.

But not all official acts are discretionary. And, in particular, the President has no "discretion" to violate criminal law. No one does—that is what it

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Shaykh Anwar Al-Aulaqi [REDACTED] (July 16, 2010), *available at* https://perma.cc/A2A6-FRF5.

means to have a rule of law. And *Marbury* establishes that where the President does not have discretion, courts may review his actions.

Former President Trump argues that "[t]he duty to comply with 'generally applicable' criminal laws cannot plausibly be described as 'ministerial,'" but is "quintessentially discretionary." Pet. Br. 31. But the central premise of *Marbury* is not that presidential acts are reviewable *only* if "ministerial," but that such acts are reviewable because they are *not within the President's "discretion."* Chief Justice Marshall explained that this discretion comes from "the constitution of the United States," which "invest[s]" the President "with certain important political powers" that the President may "exercise." *Marbury*, 5 U.S. (1 Cranch) at 165. He also emphasized that "legal discretion" is not the same as "an arbitrary will." *Id.* at 153. Because no one has "discretion" to violate criminal law—and because the Constitution does not endow the President with political powers to violate it, either—charges that the President has done so are equally reviewable.

As the court below explained, *Marbury* and its progeny "confirm" that courts "may review the President's actions when he is bound by law, including by federal criminal statutes." Pet. App. 22. That was true in *Little v. Bareme*, where the Supreme Court found that President Adams had unlawfully ordered a subordinate officer to seize American ships traveling to or from French ports. 6 U.S. (2 Cranch) 170, 177–79 (1804). It was true in *Kendall v. United States ex rel. Stokes*, where the Court reviewed the official acts of President Jackson's postmaster general for violation of a statutory requirement, and explained that accepting the postmaster's argument that his

official acts were unreviewable "would be clothing the President with a power to control the legislation of congress, and paralyze the administration of justice." 37 U.S. 524, 525 (1838). It was true in *Humphrey's Executor v. United States*, where the Court invalidated President Roosevelt's attempt to remove a Federal Trade Commissioner because it violated the "definite and unambiguous" terms of a federal statute. 295 U.S. 602, 623 (1935). And it was true in *Trump v. Hawaii*, where this Court reviewed (and ultimately approved of) President Trump's Proclamation that "placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate." 585 U.S. 667, 677 (2018).[5]

Cases subjecting presidential orders to judicial review, while not speaking directly to the issue of absolute immunity for criminal liability after leaving office, nonetheless reinforce the principle that Presidents are not above the law, and that their actions may be reviewed by courts for violations of it. In *Youngstown*, for example, the Court's most iconic review of presidential power, it enjoined President Truman's attempted seizure, by executive order, of many of the country's steel mills during wartime. The Court held that the order exceeded his constitutional and statutory authority. 343 U.S. at 587–89 (majority opinion). Justice Jackson's concurrence has since

[5] In that case, the Court assumed without deciding that it had the "authority" to review the Proclamation. 585 U.S. at 682. Notably, though, President Trump's Solicitor General did *not* argue that the Court lacked *jurisdiction* to review the Proclamation, but only that other justiciability doctrines should lead the Court to decline review. *Id.* at 682–83.

become the controlling framework for evaluating claims of presidential power. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015). It explained that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Courts can review, and reject, official presidential acts that violate the law because "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* at 637. Justice Jackson continued: "Courts can sustain exclusive Presidential control in such a case only b[y] 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." *Id.* at 637–38.

Former President Trump argues that cases involving this Court's review of the official acts of subordinate executive officers—including *Little*, *Kendall*, and *Youngstown*—have no bearing on whether a President can be held criminally accountable for his official acts. Pet. Br. 31–33. But as *Youngstown* makes clear, the Court's power to review official acts is not determined by the identity of the officer, but by the source of the officer's power.[6] The

[6] In *Youngstown*, the Court opened its opinion by explaining that "[w]e are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills." 343 U.S. at 582

former President suggests that had the President *himself* seized an American ship (*Little*) or the steel mills (*Youngstown*), the Court would have turned away entirely. Or that it would do the same if instead of ordering others to implement the "objectively unlawful" "forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race," acting "outside the scope of Presidential authority," a President simply rounded up those citizens himself. *Hawaii*, 585 U.S. at 710 (discussing *Korematsu v. United States*, 323 U.S. 214 (1944)).

But Presidents don't generally act entirely unilaterally, and nothing in those cases suggests that they are immune where they do.[7] Quite the opposite. These decisions support the fundamental principle that a President's "official acts," like those of any government official, must conform to law, and are generally reviewable. The point of these cases is not that the President has impunity if he uses his own hands; it is that the President cannot have others act for him if he lacks the presidential authority to act in the first place. While the powers granted to the President are vast, even the Take Care Clause requires the "faithful[] execut[ion]" of "the Laws," U.S. Const. art. II, sec. 3; as Justice Jackson put it, the

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(majority opinion). Elsewhere, it treated the President himself as the one who "t[ook] possession of property" in the case. *Id.* at 585. The technical distinction was not important to the outcome.

[7] Indeed, at oral argument below, President Trump's counsel treated a hypothetical order to U.S. Navy Seal Team 6 to assassinate a political rival as the President's own "official act." Oral Argument at 8:08–10:42, *United States v. Trump*, No. 23-3228 (D.C. Cir. Jan. 9, 2024), *available at* https://www.c-span.org/video/?532581-1/district-columbia-circuit-court-oral-arguments-president-trumps-immunity-claims.

clause is "a governmental authority that reaches [only] so far as there is law." *Youngstown*, 343 U.S. at 646. That "signif[ies] about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules." *Id.*

In sum, it has long been recognized, by the executive and judicial branches alike, that Presidents can be subject to the criminal law after they leave office. While certain wholly discretionary acts may not be subject to judicial review, there is no "discretion" to violate federal criminal law, and this Court has long held that Presidents, like other federal officials, are accountable to the law, and the courts, in appropriate cases.

II. THE JUSTIFICATIONS FOR ABSOLUTE IMMUNITY FROM CIVIL LIABILITY FOR A PRESIDENT'S OFFICIAL ACTS DO NOT JUSTIFY ABSOLUTE IMMUNITY FROM CRIMINAL LIABILITY.

Former President Trump argues that the same concerns that animate absolute immunity from civil liability for presidential official acts call for immunity from criminal prosecution as well. But as the D.C. Circuit correctly held, one does not follow from the other. The significant distinctions between civil and criminal liability call for different results. In particular, the risk of widespread or harassing criminal prosecutions is considerably less substantial than the risk of civil suits. And society's interest in enforcement of criminal law is, as a general matter, greater than the interest in enforcing civil law. For these reasons, there is no warrant to extend to

criminal liability the immunity Presidents enjoy as to civil liability.

The former President insists that "[c]riminal prosecution presents a moral threat to the Presidency's independence," and the "threat of *future* prosecution will cripple *current* presidential decisionmaking." Pet. Br. 26. But as outlined above, Presidents have long assumed they were bound by the federal criminal law and could be prosecuted after leaving office, including President Trump himself. There is no evidence that this possibility interfered in any way with their ability to discharge their duties.

In assessing claims of presidential immunity, this Court has balanced the interests at stake in holding Presidents accountable, and in ensuring that Presidents are not unduly chilled in their ability to carry out their important role. *See, e.g.*, *Vance*, 140 S. Ct. at 2432 (Kavanaugh, J., concurring) ("The question here, then, is how to balance the State's interests and the Article II interests."); *Nixon*, 418 U.S. at 707–13; *cf. Butz v. Economou*, 438 U.S. 478, 506 (1978) (explaining that "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope").

In *Nixon v. Fitzgerald*, this Court held that the President is absolutely immune from civil damages arising from his official acts, concluding that leaving Presidents open to a potentially limitless range of civil lawsuits after they leave office would unduly limit their ability to do their job. 457 U.S. 731 (1982). "The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with

their resolve to perform their designated functions in a principled fashion." *Clinton*, 520 U.S. at 693 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203–04 (1979)); *see also Fitzgerald*, 457 U.S. at 752 n.32.

But exposure to criminal liability calls for a very different balance, both because the risk of harassing suits is significantly diminished, and because society's interest in enforcement of criminal prohibitions is generally greater. As the court below correctly concluded, "[i]t would be a striking paradox if the President, who alone is vested with the constitutional duty to 'take Care that the Laws be faithfully executed,' were the sole officer capable of defying those laws with impunity." Pet. App. at 36–37.

There is a much lower risk that frivolous charges will be filed against former Presidents by federal prosecutors than that harassing civil lawsuits will be filed by private parties. In *Fitzgerald*, this Court explained that "[i]n view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages." 457 U.S. at 753. But while there are hundreds of millions of private citizens—"self-chosen 'private attorney generals,'" as President Nixon called them in his brief to the *Fitzgerald* Court[8]—who might assert harassing or frivolous civil claims against a President, only a federal prosecutor can indict a former President for violating federal criminal law. Prosecutors are bound by ethical obligations and Justice Department policies that cabin their prosecutorial powers. *See* Pet. App. at 35. Moreover, United States Attorneys are part of the

[8] Br. for Petitioner at *41, *Nixon v. Fitzgerald*, Nos. 79-1738 & 80-945 (Oct. 27, 1981), 1981 WL 389863.

Executive Branch, and will have an institutional interest in avoiding overreach that would weaken the Presidency. Federal prosecutors must also secure the return by a grand jury of a true bill based on probable cause that the President committed a crime. U.S. Const. amend. V. And the burden of proof in criminal cases, though not strictly a barrier to indictment, poses an additional safeguard against baseless prosecutions. Thus, the concerns the Court has identified regarding civil liability are substantially diminished with respect to criminal liability.

Moreover, as a practical matter, a United States Attorney will not indict a former President without the affirmative permission of the Attorney General himself or herself. As the appeals court concluded, "[t]he risks of chilling Presidential action or permitting meritless, harassing prosecutions are unlikely, unsupported by history and 'too remote and shadowy to shape the course of justice.'" Pet. App. at 37 (quoting *Clark v. United States*, 289 U.S. 1, 16 (1933)). All in all, "the risk that former Presidents will be unduly harassed by meritless federal criminal prosecutions appears slight." Pet. App. at 35.

Weighing out society's interests also suggests treating criminal and civil liability differently. Making conduct a federal crime is society's strongest medicine, reflecting a congressional judgment that the conduct is sufficiently blameworthy to warrant (in most cases) the deprivation of physical liberty itself. And because one of the chief justifications for criminal laws is deterrence, the fact that criminal liability may deter the prohibited conduct is a feature, not a bug—even when the President is the perpetrator. As the court below noted, "[i]nstead of inhibiting the President's lawful discretionary action, the prospect of

federal criminal liability might serve as a structural benefit to deter possible abuses of power and criminal behavior." Pet. App. at 34. And as the district court in this case put it, "Every President will face difficult decisions; whether to intentionally commit a federal crime should not be one of them." *United States v. Trump*, Crim. No. 23-257, 2023 WL 8359833, at *9 (D.D.C. Dec. 1, 2023).[9]

III. THE PRINCIPLE THAT THE PRESIDENT IS NOT ABOVE THE LAW IS NOWHERE MORE IMPORTANT THAN IN ENSURING THE PEACEFUL TRANSITION OF POWER.

While the Court's rule regarding absolute immunity from federal criminal liability is likely to be categorical, this particular prosecution exemplifies why Presidents should not be absolutely immune from criminal prosecution. The allegations against former President Trump are not run-of-the-mill criminal charges, but strike at the heart of one of the most essential hallmarks of democracy: the peaceful transition of power. The indictment alleges that President Trump, having lost the election, intentionally engaged in acts designed to remain illegitimately in power in contravention of the will of the people.

Former President Trump rejects the appeals court's reliance on this feature of this case as "gerrymandered." Pet. Br. 47. But there is nothing

[9] Amici do not independently address the Impeachment Clause, but agree with the court of appeals that it offers no shelter to the President from criminal prosecutions after he leaves office. Pet. App. 41–50.

selective about the rule announced: Presidents are not absolutely immune from federal criminal liability, even for assertedly official acts, after they leave office. The application of the principle here only serves to underscore the immense, and ultimately unsupportable, costs of extending such immunity. It would allow future Presidents to abuse their office to resist the transition of power. The fact that the former President seeks immunity for such action only makes plain how extraordinary and unacceptable his plea is.

To be clear, the Court should rule that Presidents generally lack absolute immunity from federal criminal prosecution, even for official acts, once they leave office. As in the civil liability context, the immunity rule here should not turn on the particular federal crime alleged. But the breadth of the power the former President is asserting is exemplified by its invocation in this very case. On the former President's view, even if he had personally conspired with a circle of his supporters to assassinate the Vice President and hold Congress hostage in order to remain in power, he would be immune from criminal prosecution thereafter. The very audacity of the claim reveals its central flaw—it would for all practical purposes allow a rogue President to seek to transform a government of laws into a fiefdom for himself, and to avoid all criminal accountability thereafter for doing so. That proposition cannot be squared with the most fundamental premises of a constitutional democracy, and must be rejected.

CONCLUSION

For all of the above reasons, the decision of the court of appeals should be affirmed.

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Respectfully submitted,

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