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 D.C. Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, a consumer advocacy organization with members in all 50 states, appears before Congress, administrative agencies, and the courts on a wide range of issues, including accountability of the government, corporations, and others for wrongdoing. Public Citizen has longstanding interests in issues involving separation of powers, official immunity doctrines, and the preservation of American democracy, and it frequently appears as a party or amicus curiae in cases that, like this one, implicate those issues.

Public Citizen agrees fully with the position of the United States that a former President is not entitled to absolute immunity against prosecution for alleged criminal misconduct committed while he was in office, and that impeachment and conviction are not prerequisites to such prosecution. Without repeating those arguments, Public Citizen submits this brief to address petitioner Donald Trump's contention that the conduct alleged in this case—an attempt by a President to subvert the results of an election and unlawfully remain in office despite losing that election—falls within the "outer perimeter" of the President's authority. The brief explains that, even if the Court were to entertain the possibility of some form of immunity from prosecution for actions within the scope of a President's authority, the Court should not accept the premise that an attempt by a President to overturn the constitutional order by resisting the

[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief.

lawful and peaceful transfer of power constitutes an exercise of presidential authority.

SUMMARY OF ARGUMENT

The President has no specific, constitutionally assigned role in the conduct of presidential elections. And any assertion that a President's authority empowers him to conspire to overturn the result of a valid election and retain power beyond his term in office would be absurd. Mr. Trump in this case nonetheless insists that the conduct with which he is charged must be accepted by the federal courts as falling within the outer perimeter of his authority because, under his reading of the Court's decision in *Marbury v. Madison*, 5 U.S. 137 (1803), a President's purportedly official actions are never examinable by the courts. That account of *Marbury* is fictitious. The passage on which Mr. Trump relies says only that when the Constitution commits certain authority to the President's exclusive discretion, courts may not review the exercise of that discretion. Obviously, the Constitution does not commit to the President discretion to overturn an election. Moreover, although the Court has limited the ability of courts to grant remedies against sitting Presidents, it has often reviewed presidential actions and rejected claims that they fall within the scope of the President's authority.

Mr. Trump also relies on the very broad scope that courts have sometimes given to the boundaries of official action in cases involving the absolute immunity of Presidents, judges, and prosecutors against civil damages liability. The considerations that support those decisions, however, are inapplicable to criminal prosecutions, where the public interest in law enforcement is greater and

where the likelihood of a large volume of litigation of debatable merit is much smaller.

Accepting a view of the outer limits of presidential authority that would sweep in a conspiracy to overturn an election and remain in office unlawfully would have exceptionally broad implications and threaten severe damage to our constitutional democracy. That view would leave little to deter a President who had lost an election but had the ambition and audacity to seek to resist the peaceful transfer of power that has been a hallmark of our democratic republic. If a President in that scenario succeeded in grasping power away from his rightful successor by intimidating Congress, he would have little reason to fear impeachment. If he did not succeed, he would almost immediately leave office and, again, face little likelihood of impeachment. Criminal prosecution, then, is the sole mechanism for holding an unscrupulous President accountable for unlawfully attempting to hold on to power. An immunity doctrine that allows a President to act with impunity would pose a grave threat to our constitutional order.

ARGUMENT

I. Federal courts have authority to review the lawfulness and constitutionality of presidential actions.

Mr. Trump posits that he is immune from prosecution in this case because the conduct alleged in the indictment against him was official action that fell within the "'outer perimeter' of his official responsibility." Pet. Br. 4 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982)). As the decision below explains, there is no sound basis for creating a new form of immunity from prosecution of a former President for criminal

acts performed under color of his office. Moreover, Mr. Trump's claim of immunity rests on a sweeping conception of the outer perimeters of presidential authority that finds no support in our Constitution.

The acts alleged in the indictment cannot reasonably be characterized as falling within even the outermost bounds of the President's authority. The indictment charges the President with a deliberate scheme to subvert the results of an election that he had lost and to remain in office in violation of the Constitution and laws of the United States. The idea that a scheme to overthrow the constitutional order and usurp the office of the presidency falls anywhere but far beyond the perimeter of the President's authority is nonsensical.

Nowhere does the Constitution either explicitly or implicitly grant the President authority to override its provisions establishing a President's term in office and the means for electing the President who will serve the following term. *See* U.S. Const. art. II, § 1; *id*. amends. XII, XX, & XXII. A claim of such authority is antithetical to a constitutional design in which the President's dependence for continuance in office on the will of the people, expressed through the electoral process, was a principal safeguard for the preservation of republican government. *See* The Federalist Nos. 68, 70–72.

Indeed, the Constitution does not grant the President any express powers with respect to the selection of electors, their casting of ballots, the certification and transmission of their votes, or the counting of votes in the presence of the Senate and House of Representatives. *See* U.S. Const. art. II, § 1, cl. 2; *id*. amend. XII. It provides that the person

elected through that process "shall be the President," *id*. amend. XII, regardless of any action by the incumbent. Moreover, the Constitution incorporates explicit safeguards—such as exclusion of Senators, Representatives, and other federal officeholders from the role of elector—that recognize the danger of intrusion into the process by those who "might be suspected of too great devotion to the President in office." The Federalist No. 68.

Mr. Trump nowhere identifies any constitutionally or statutorily assigned role for the President in the process of certifying the results of an election. Still less does he explain how *overturning* the properly certified results of an election in order to remain in office in violation of the Constitution could even arguably fall within the outer limits of presidential responsibility. Instead, he argues that, because communications with the public and public officials in support of *legitimate* concerns about election results could fall within the scope of a President's responsibility, communications directed at those same audiences to enlist their support for a fraudulent scheme to overturn an election must similarly be viewed as within the outer perimeter of the President's authority. *See* Pet. Br. 4–5.

Mr. Trump's argument that the federal courts may not, in the context of a criminal case, distinguish between legitimate exercises of presidential authority and the pretextual invocation of presidential authority to advance a scheme to block the lawful transfer of power rests largely on a highly distorted reading of a single passage in *Marbury v. Madison*. According to Mr. Trump, *Marbury* "held that a President's official acts 'can never be examinable by the courts.'" Pet. Br. 3 (quoting *Marbury*, 5 U.S. at 166). The cited passage

(which is dicta, not a holding) in reality says something very different.

Far from suggesting that *no* official acts of the President are "examinable by the courts," the Court's discussion is limited to instances where the Constitution invests the President "with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character." 5 U.S. at 165–66. With respect to such powers specifically "entrusted to the executive"—the one example that the *Marbury* opinion mentions is the conduct of the "department of foreign affairs," *id*. at 166—"the decision of the executive is conclusive." *Id*. Thus, when a subordinate officer acts in accordance with a presidential directive as to such a matter, "[t]he acts of such an officer, as an officer, can never be examinable by the courts." *Id*. By contrast, where the Constitution does not grant the President unconstrained authority, an executive officer acting at the President's direction is "amenable to the laws for his conduct." *Id*.

In short, nowhere does *Marbury* express or support Mr. Trump's sweeping assertion that a President's official acts are never examinable by courts. Indeed, one of *Marbury*'s holdings was that a court could and indeed must examine the legality of any direction by the President that the Secretary of State withhold Marbury's commission. *See* 5 U.S. at 167–68; *see also id*. at 173–80 (holding that the Supreme Court could not constitutionally be vested with *original* jurisdiction to review the claim).

The circumstances of this case place it far beyond the reach of *Marbury*'s dicta limiting judicial examination of presidential directives. Nowhere does the Con-

stitution empower the President to make discretionary, conclusive decisions with respect to the selection of presidential electors, their voting and certification of votes, or the counting of those votes by Congress. Nowhere does the Constitution grant the President discretionary authority with respect to the conduct of elections more generally or the determination of the President's successor in office. The carefully limited language from *Marbury* that Mr. Trump cites thus offers no support for the proposition that the kinds of actions at issue in this case are not examinable by the courts.

Moreover, contrary to repeated assertions in Mr. Trump's brief, this Court has never expanded *Marbury*'s dicta into a more general proposition that presidential actions cannot examined by the courts. Indeed, the Court has seldom cited that passage in *Marbury*, let alone generalized it to all presidential actions. None of the decisions Mr. Trump cites supports his assertion that the Court has construed *Marbury* to preclude judicial examination of all presidential actions. Rather, *Martin v. Mott*, 25 U.S. 19, 29–31 (1827), and *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), held only that judicial review was unavailable where Congress had expressly delegated specific decisions concerning national defense or foreign policy to the President's discretion. *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 610 (1838), held that a presidential appointee could be compelled to act by a writ of mandamus, and contained only one line of dicta stating that other branches cannot control the President's exercise of powers *conferred by the Constitution*. And in *Mississippi v. Johnson*, 71 U.S. 475 (1866), the Court expressly declined to address

whether a President "may be held amenable, in any case, otherwise than by impeachment for crime" and, instead, considered *only* whether a sitting President could be *enjoined* from carrying out an unconstitutional statute. *Id*. at 498.

In fact, the Court has repeatedly held that, although remedies and rights of action directly against a *sitting* President are generally unavailable, *see Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992), the lawfulness and constitutionality of presidential actions may be examined by the courts, *see id.* at 801. For example, only a year after *Marbury*, Chief Justice Marshall wrote the Court's opinion in *Little v. Barreme*, 6 U.S. 170 (1804), holding that President Adams's order authorizing the seizure of a ship during undeclared hostilities between the United States and France was unlawful, and that a naval officer who carried it out could be sued for damages. In *Ex parte Milligan*, 71 U.S. 2 (1866), this Court held that orders of Presidents Lincoln and Johnson authorizing trial of a non-combatant civilian by military tribunal, and ratifying the results of that trial, were unlawful. In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432 (1935), the Court held unlawful President Roosevelt's executive order regulating industrial production under the purported authorization of the National Industrial Recovery Act, on the grounds that it reflected action not "appropriately belonging to the executive province." And in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court examined the lawfulness of President Truman's seizure of steel plants during the Korean War and held that the seizure order exceeded the President's constitutional authority.

More recently, this Court in *Trump v. Hawaii*, 585 U.S. 667 (2018), examined and sustained on the merits both the constitutionality and the lawfulness under governing statutes of President Trump's order restricting entry into the United States of foreign nationals from eight countries. The Court "assumed" the reviewability of the statutory challenge in the face of claims that it was nonjusticiable based on the "doctrine of consular nonreviewability," *id.* at 682–83, and squarely held that the constitutional challenge was properly before it, *see id.* at 697–99. Nothing in the decision supports the view that presidential acts are not examinable. Indeed, the Court's consideration of the constitutional challenge explicitly considered the objectives of the challenged action, and whether it could "reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.* at 705.

Importantly, the Court in *Trump v Hawaii* rejected the assertion that its merits ruling implied that it might be permissible for a President to force U.S. citizens into concentration camps on the basis of race—as President Roosevelt had done in the action upheld by the Court in *Korematsu v. United States*, 323 U.S. 214 (1944). The Court expressly overruled *Korematsu*, stating that the decision "was gravely wrong the day it was decided" and "'has no place in law under the Constitution.'" 585 U.S. at 710 (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)). But the Court went further still: It stated that "[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is *objectively unlawful* and *outside the scope of Presidential authority*." *Id.* (emphasis added).

Trump v. Hawaii thus explicitly recognizes that a presidential action undertaken with invidious intent to undermine the Constitution can—despite superficial resemblance to lawful actions that might be undertaken for legitimate objectives—be objectively determined to fall outside the bounds of presidential authority. That recognition is wholly at odds with Mr. Trump's submission that *Marbury* precludes judicial examination of any presidential action, no matter how inimical it may be to the constitutional order.

II. A sweeping view of presidential authority derived from cases involving immunity from civil damages actions has no place in a case involving a criminal prosecution.

Mr. Trump asks this Court to adopt a principle of immunity from criminal prosecution for former Presidents and to extend to the criminal context the broad conception of the "outer perimeter" of official responsibility that courts have developed in cases involving claims for civil damages for official actions of the President, judges, and prosecutors. In particular, Mr. Trump asserts that courts must always disregard the lawfulness of a defendant's alleged objectives in determining whether his action falls within the outer perimeters of his official responsibilities. *See* Pet. Br. 48. That sweeping concept of official authority and the expansive scope of immunity it would afford have no place in cases involving criminal liability.

Mr. Trump's argument rests on cases involving claims of absolute immunity from civil damages liability, such as *Pierson v. Ray*, 386 U.S. 547 (1967), and *Blassingame v. Trump*, 87 F.4th 1 (D.C. Cir. 2023). In *Pierson*, the Court stated that a judge's abso-

lute immunity against claims for damages arising from judicial acts "applies even when the judge is accused of acting maliciously and corruptly." 386 U.S. at 554. In *Blassingame*, the D.C. Circuit suggested that a former President's absolute immunity against civil damages liability exists whenever the suit targets acts taken as President in a purported "official capacity," regardless of whether those actions are even arguably lawful exercises of presidential authority. 87 F.4th at 26.

The exceptionally broad scope that courts have given the doctrine of absolute official immunity against civil damages liability for Presidents, judges, and prosecutors, however, involves considerations that are specific to civil damages actions and inapplicable to criminal prosecutions. The scope of absolute presidential immunity against civil liability set forth in *Nixon v. Fitzgerald*, for example, reflected the Court's view that a "merely private suit for damages based on a President's official acts," unlike an action brought "to vindicate the public interest in in an ongoing criminal prosecution," does not involve an interest of sufficient "constitutional weight" to justify "intrusion on the authority and functions of the Executive Branch." 457 U.S. at 754. That *Nixon v. Fitzgerald* was premised on "the lesser public interest in actions for civil damages than, for example, in criminal prosecutions," *id.* at 754 n.37, rules out Mr. Trump's argument that immunity principles in civil cases apply "a fortiori" to criminal cases, Pet. Br. 15.

In addition, the scope of absolute immunity against civil damages actions reflects the Court's concern that a narrower scope that involved any consideration of the defendant's intent or of the lawfulness of the alleged conduct "would subject the President to trial

on virtually every allegation that an action was unlawful, or was undertaken for a forbidden purpose," *Nixon v. Fitzgerald*, 457 U.S. at 756, and subject Presidents and former Presidents to a potentially overwhelming volume of claims. The likelihood of such claims is heightened by the "visibility of [the President's] office and the effect of his actions on countless people," that would make "the President … an easily identifiable target for suits for civil damages." *Id.* at 753. These considerations argue for a broad and easily administrable scope for immunity in civil damages actions to avoid burdening former Presidents with a flood of claims once their service to the country is concluded.

By contrast, the number of claims of unlawful presidential action that would arguably involve *criminal* misconduct is much smaller than the number that could be civilly actionable. The handful of examples that Mr. Trump offers of potential criminal claims—most of which hardly seem likely to serve as plausible bases for prosecution—underscore the point. *See* Pet. Br. 23. That criminal prosecution would require an exercise of judgment by a federal prosecutor and indictment by a grand jury make it much less likely that a criminal proceeding against a former President would be lightly undertaken than that a proliferation of civil actions of dubious merit would exhaust a former President's time, energy, and resources. The substantial burden of proof required for criminal proceedings, and the extensive protections afforded criminal defendants by our system, further differentiate such proceedings from civil damages actions. In light of the greater public interest in enforcement of the criminal law, and the likelihood that rare cases of criminal prosecution against a

former President would, like this one, involve charges of the utmost gravity, the very broad scope that the courts have given the concept of the "outer perimeters" of official authority in civil damages cases has no place in cases involving claims of immunity against criminal prosecution.

Cases involving criminal charges against federal judges illustrate the point. Although, as Mr. Trump points out, an allegation of corruption does not overcome absolute judicial immunity against civil damages claims, *see* Pet. Br. 48 (citing *Pierson*, 386 U.S. at 554), federal judges enjoy no comparable immunity from criminal prosecution if they accept bribes or extort payments in return for judicial rulings. Rather, the courts have regularly entertained such prosecutions and rejected claims that they violate separation-of-powers principles.[2] Such prosecutions may turn on inquiries into the intent with which certain judicial actions were carried out—inquiries that would be foreclosed by absolute judicial immunity in a civil damages action—but the denial of a defense of official immunity does not threaten the functioning of the judicial branch because corruption lies far outside the legitimate scope of judicial authority. And the reasons for protecting such conduct against claims for civil damages liability do not apply when it is properly made the subject of criminal charges.

Similarly, a conspiracy to forestall the lawful transfer of presidential power through false and

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[2] *See*, *e.g.*, *United States v. Collins*, 972 F.2d 1385 (5th Cir. 1992); *United States v. Claiborne*, 727 F.2d 842 (9th Cir.), *stay denied*, 465 U.S. 1305 (Rehnquist, J.), *cert. denied*, 469 U.S. 829 (1984); *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982).

fraudulent means and attempts to suborn unlawful acts by other public officials may serve as the basis of prosecution even if it might arguably fall within the broad scope of immunity against civil damages liability. Such conduct is, *objectively*, beyond any reasonable limits of the President's power—just as this Court held in *Trump v. Hawaii* that placing citizens in concentration camps for invidious reasons would be objectively unlawful and outside the scope of presidential authority. *See* 585 U.S. at 710. The potential imposition of criminal liability for such conduct—if it is proven to violate the terms of a federal criminal statute—does not derogate from any legitimate presidential authority.

Moreover, allowing prosecution of a former President in such circumstances would not, as Mr. Trump argues, amount to subjecting him to criminal liability based on the premise that the "motive" of seeking to remain in office is in itself illicit. Indeed, the Founders recognized that the ability of a President to win reelection by taking actions approved of by the people is a benefit to the body politic. Thus, Alexander Hamilton argued that eligibility of the President for reelection "is necessary to enable the people, when they see reason to approve of his conduct, to continue him in his station, in order to prolong the utility of his talents and virtues, and to secure to the government, the advantage of permanency in a wise system of administration." The Federalist No. 72. Accordingly, an otherwise proper exercise of presidential authority does not become improper because the President's motive for taking it may include its electoral benefits. And it is exceedingly unlikely that any federal statute could be read to impose criminal liability on a President for taking an otherwise lawful action

because it was motivated in part by a desire to enhance prospects for reelection.

Here, the indictment does not charge the President with taking official actions to enhance the likelihood that voters would cast their ballots for him and his slates of electors. Rather, it alleges that, having lost the election, he knowingly advanced false claims that he had won and took other actions to impede the transfer of authority to the winner. The indictment's premise—that a conspiracy undertaken with the objective of remaining in power unlawfully is both illegal and beyond the bounds of presidential authority—does not depend on condemnation of presidential actions based on electoral motives.

III. Petitioner's theory of immunity has far-reaching and dangerous consequences.

Adoption of Mr. Trump's theory of immunity from criminal liability for all conduct within his conception of the "outer perimeter" of a President's official functions would shield a wide range of blatant criminal conduct. For a President tempted to engage in such conduct, his theory would eliminate any deterrent to the kinds of activities that pose the gravest danger to our constitutional system.

A. Under Mr. Trump's theory, if a course of conduct is carried out through means that in form resemble those used for the exercise of legitimate presidential authority, it falls within the "outer perimeter" of official presidential responsibility. Thus, as his counsel acknowledged in oral argument before the court of appeals, the President's authority to give *lawful* direction to members of the armed forces means, under Mr. Trump's theory of immunity, that an order that a SEAL team assassinate a political

rival would fall within the outer perimeter of presidential authority and, thus, within the scope of the immunity from criminal prosecution that Mr. Trump hypothesizes. *See* J.A. 131–33.

Likewise, because the President has authority to give direction to Treasury officials concerning the lawful payment of appropriated federal funds,[3] a direction that those officials unwittingly assist in an embezzlement scheme by paying funds to offshore accounts secretly controlled by the President would, under Mr. Trump's view, fall within the outer perimeters of presidential responsibility. The President's authority to direct executive officials to provide information to Congress, *see* U.S. Const. art. II, § 3, would similarly bring a direction that a subordinate commit perjury within the outer perimeter of presidential authority. The President's authority to give direction to the Attorney General regarding litigation priorities[4] would mean that a scheme to extort payments from an antitrust defendant for the President's personal benefit in return for a direction that the Department of Justice settle the case against it would be immunized. Indeed, virtually any bribery or extortion scheme involving the President's acceptance of payments for taking or withholding some action would, under Mr. Trump's theory, fall within the outer perimeters of presidential authority. Even treason would be protected, because Mr. Trump's

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[3] *See Clinton v. City of New York*, 524 U.S. 417, 446 (1998) (noting that the President often has "broad discretion over the expenditure of appropriated funds").

[4] *Cf. Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2204 (2020) (discussing presidential control of principal officers who "set enforcement priorities").

theory would suggest that because the President has broad authority to engage with foreign powers, the interactions with our enemies that a treasonous plot would necessarily involve would fall within the outer perimeters of his foreign affairs responsibilities.[5]

Just as alarmingly, Mr. Trump's theory would immunize a President who attempted to order the armed forces to stage a coup d'etat to overthrow the other branches of government and install him as president-for-life. Because the President has power as commander-in-chief to order the armed forces to take military action to protect the United States against foreign enemies and domestic insurrectionists, and because a coup d'etat would likewise involve ordering military action by forces subject to the President's lawful orders, the violent overthrow of the constitutional order would, under Mr. Trump's theory, be immune from prosecution as action falling within the outer perimeters of presidential authority.

Extreme as this example is, it is scarcely more extreme than the result sought in this case. Here, Mr. Trump asserts that when a President who lost an election participates in a conspiracy to overturn the results of that election, thwart the peaceful transfer of power in accordance with those results, and seize the presidency in violation of the means established by the Constitution and laws for the election of a President, he acts within the perimeters of presidential authority—simply because his legitimate presidential responsibilities could involve *lawful* communications

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[5] In the court of appeals, Mr. Trump's counsel stated that, unlike assassination of a political rival, "[s]ale of military secrets … might not be held to be an official act," J.A. 132, but could offer no explanation for that distinction, *see* J.A. 133.

with the institutions, officials, and members of the public whom he sought to involve in (or deceive and intimidate through) his unlawful efforts. No less than an assertion that a military coup falls within the outer perimeters of presidential responsibility, Mr. Trump's claim that he is immune from prosecution for conspiring to usurp presidential power implies that the outer perimeter of the powers that the Constitution confers on the President includes the authority to destroy the Constitution itself.

The Court thus cannot leave to another day concerns about "where some hypothetical 'slippery slope' may deposit us." *CFTC v. Schor*, 478 U.S. 833, 852 (1986). The result Mr. Trump seeks forecloses the possibility of limiting principles, exit ramps, guardrails, or stopping points on the slippery slope by "ski[ing] it to the bottom." Robert Bork, *The Tempting of America* 169 (1990). Put another way, this case is not one where "the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). In Justice Scalia's memorable words, "this wolf comes as a wolf." *Id.*

B. In addition to bringing within the scope of immunity those presidential actions most inimical to the constitutional order, Mr. Trump's theory also encompasses those where the remedy of impeachment and conviction—which in Mr. Trump's view is always required to remove criminal immunity for presidential actions that fall within his expansive view of the "outer perimeter" of presidential authority—is almost certain to lack deterrent effect. A President willing to conspire to remain in office by subverting the constitu-

tional processes for transition of power will have little to fear from the prospect of impeachment. If he is successful, there is scant likelihood that a Congress he has cowed into acquiescing in the overturning of the election will then have the temerity to impeach and convict him; if the President has forcibly prevented it from convening, it may even lack the physical ability to do so.

On the other hand, if the President's effort to block the lawful transfer of power fails, he will soon be out of office, rendering impeachment and conviction unlikely and, in any event, ineffectual. It may also be impossible. As the Congressional Research Service has observed, "[i]n recent history, both the House and the Senate have generally decided not to proceed with the impeachment" of officers who have left office, likely "based on a judgment that removal is often the primary, if not the sole goal of an impeachment trial" and on other "prudential" considerations. Cong. Research Serv., *The Impeachment and Trial of a Former President* 5 (2021). In Mr. Trump's own second impeachment trial, dozens of Senators expressed doubt that the Constitution even permits conviction of a former President in an impeachment trial. *See* J.A. 53 & n. 13.[6]

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[6] "The Constitution does not directly address whether Congress may impeach and try a former President for actions taken while in office." Cong. Research Serv., *supra*, at 1. Article II provides that "[t]he President … shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. II, § 4. But it does not explicitly provide for impeachment and conviction of an individual who is no longer "the President." Article I's conferral of the impeachment power, however, contains no limitation

(*Footnote continued*)

For a President determined to stay in office after a defeat at the polls, then, attempting to do so through unlawful means would be a no-lose proposition absent the threat of criminal punishment if the effort failed. This Court's adoption of Mr. Trump's theory of absolute presidential immunity against prosecution for unlawful actions that fall within his expansive conception of the perimeters of presidential power would severely limit the protection of the nation against one of the most serious forms of misconduct a President might contemplate: overthrow of our democratic, constitutional form of government.

Trust that the good faith of our elected leaders will prevent them from attempting such unlawful acts, or that resistance from others will prevent any such attempts from succeeding, provides no basis for adopting a new immunity doctrine that would protect a former President who had engaged in those acts. The Framers of our Constitution did not trust that no President would be tempted to aggrandize his powers, and therefore they put in place checks to prevent such efforts from succeeding. As Justice Frankfurter observed in *Youngstown*, "[t]he experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. These long-

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to sitting officeholders. *See id.* art. I, § 2, cl. 5. Moreover, Article I expressly contemplates disqualification from office as an additional potential consequence of conviction in a case of impeachment, *see id.* art. I, § 3, cl. 7, and thus indicates that impeachment is not a moot point for a former officeholder. Accordingly, the Congressional Research Service concluded that, while "most scholars" believe impeachment and conviction of a former President is permissible, "the text is open to debate." Cong. Research Serv., *supra*, at 1–2.

headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power." *Youngstown*, 343 U.S. at 593 (Frankfurter, J., concurring).

Nearly three-quarters of a century later, those words retain their power, reinforced by many more instances in which elected leaders of other nations have turned away from democracy and the rule of law, as well as by deeply troubling events in our own country. In considering the claim that a former President may not be forced to answer a duly issued indictment alleging that, while in office, he engaged in a conspiracy to remain in office by preventing the certification of his opponent's electoral victory, this Court must remember that we "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 (Jackson, J., concurring).

The Constitution does not silently prohibit holding a former President accountable to the law when he is alleged to have engaged in criminal violations aimed at overthrowing our constitutional form of government. Reading the Constitution to prohibit the only efficacious means of deterring its own destruction by a President tempted do so would disregard the aphorism that the Constitution "is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). This Court should not countenance invocation of constitutional principles of separation of powers "as part of the strategy for overthrowing them." *Terminello v. City of Chicago*, 337 U.S. 1, 36 (1949) (Jackson, J., dissenting).

Insistence by this Court on legal accountability for individuals, including former officials, who attempt to destroy our system of government may not be sufficient to preserve the Constitution if the people, their political leaders, and the other institutions of government fail to do their part to defend it. In that event, our institutions of free government "may be destined to pass away." *Youngstown*, 343 U.S. at 655 (Jackson, J., concurring). "But it is the duty of the Court to be the last, not first, to give them up." *Id.*

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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