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 U.S. Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER PRESIDENT DONALD J. TRUMP

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April 15, 2024

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INTRODUCTION

The Special Counsel admits that "the separation of powers precludes the criminal prosecution of a *sitting* President." Resp.Br.9. But he contends that this protection vanishes the moment the President leaves office on January 20. The Special Counsel insists that, from that day onward, any enterprising prosecutor may charge and seek to imprison the President for his *official acts*—including his most controversial and impactful decisions. Even worse, a President's opponents can wield that threat as a cudgel throughout his tenure in office, effectively blackmailing him with "personal vulnerability," *Nixon* v. *Fitzgerald*, 457 U.S. 731, 753 (1982), and distorting the most sensitive Presidential decisions.

"The Framers deemed an energetic executive essential to 'the protection of the community against foreign attacks,' 'the steady administration of the laws,' 'the protection of property,' and 'the security of liberty.'" *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2203 (2020) (quoting THE FEDERALIST NO. 70 (Hamilton)). The threat of post-office prosecution will "bog the Executive down," *id.*, into endless cycles of recrimination, "assuring that massive and lengthy investigations will occur" and "permanently encumber[ing] the Republic with" a novel practice "that will do it great harm." *Morrison* v. *Olson*, 487 U.S. 654, 713, 733 (1988) (Scalia, J., dissenting).

"Not to worry, the Government says." *United States* v. *Stevens*, 559 U.S. 460, 480 (2010). It assures the Court that its baseless, unprecedented prosecutions of President Trump do not portend a future where such prosecutions become commonplace.

The Framers of our Constitution knew better. George Washington warned against "[t]he alternate

domination of one faction over another, sharpened by the spirit of revenge natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities." *Washington's Farewell Address* 13 (1796).[1] James Madison cautioned that "the diseases of faction … have proved fatal to other popular governments." THE FEDERALIST NO. 14. Madison warned that "different leaders ambitiously contending for pre-eminence and power" will "divide[] mankind into parties, inflame[] them with mutual animosity, and render[] them much more disposed to vex and oppress each other…" THE FEDERALIST NO. 10. "[T]his propensity of mankind to fall into mutual animosities" will "kindle their unfriendly passions and excite their most violent conflicts." *Id.* The radical innovation of prosecuting a former President for official acts will fulfill those ominous prophecies.

In politically charged cases, "[t]he tendency is strong to emphasize transient results … and lose sight of enduring consequences upon the balanced power structure of our Republic." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). But "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Free Enter. Fund* v. *Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 501 (2010) (citation omitted). "Calls to abandon those protections in light of 'the era's perceived necessity,' are not unusual." *Id.* (citation omitted). This Court has resisted such calls in the past, and it should do so again here.

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[1] *Available at* https://www.senate.gov/artandhistory/history/resources/pdf/Washingtons_Farewell_Address.pdf.

ARGUMENT

I. A Former President Enjoys Absolute Immunity from Criminal Prosecution for Official Acts.

"Under our Constitution, the 'executive Power'—all of it—is 'vested in a President' … ." *Seila Law*, 140 S. Ct. at 2191 (quoting U.S. CONST. art. II, § 1). "[T]he 'executive Power' vested in the President is not confined to those powers expressly identified," but "includes all powers originally understood as falling within the 'executive Power' of the Federal Government." *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 576 U.S. 1, 35 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part).

A. *Marbury* v. *Madison* and the Executive Vesting Clause.

Marbury holds that the Executive Vesting Clause adopts a broad immunity principle, *i.e.*, that the power of Article III courts does not extend to the President's official acts, before or after he leaves office. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 164-66, 170 (1803). Under this principle, a President's official acts "can never be examinable by the courts." *Id.* at 166.

The Special Counsel has no plausible answer to *Marbury*. Resp.Br.38-40. First, he wrongly contends that *Marbury* is "fundamentally inconsistent" with the recognition that a President may be criminally prosecuted—even for official acts—*after* he is convicted by the Senate in an impeachment proceeding. U.S. CONST. art. I, § 3, cl.7. Respondent's argument reflects a basic misunderstanding of the Constitution's structure. The Framers established impeachment and conviction as a single, carefully circumscribed exception to the general principle of the

separation of powers, designed to serve as a structural check against the Presidency. This limited structural check does not undermine the separation of powers. On the contrary, that approach is a hallmark of the Constitution's structure, which repeatedly creates narrow exceptions to the separation of powers to check and balance the branches.

The Constitution does not erect "a hermetic division among the Branches," but "a carefully crafted system of checked and balanced power within each Branch." *Mistretta* v. *United States*, 488 U.S. 361, 381 (1989); *see also, e.g., Youngstown*, 343 U.S. at 635 (Jackson, J., concurring); *Perez* v. *Mortg. Bankers Ass'n*, 575 U.S. 92, 117-18 (2015) (Thomas, J., concurring in judgment); THE FEDERALIST NO. 47 (Madison). For example, the veto power, the Senate's advice-and-consent over executive appointments, and the President's selection of members of the judicial branch all provide carefully structured exceptions to the separation of powers through a limited admixture of powers designed to check and balance the coordinate branches. THE FEDERALIST NO. 47 (Madison). The Impeachment Judgment Clause's authorization of prosecution *after* Senate conviction provides another example of this "separateness but interdependence" of the branches. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

Respondent argues that *Marbury* applies only to "the President's ongoing administration," not to "a *former* President." Resp.Br.38-39. But *Marbury* held that a President's official acts "can *never* be examinable by the courts." 5 U.S. at 166 (emphasis added). *Martin* v. *Mott* held that *former* President Madison's acts during the War of 1812, performed many years earlier, could not be "passed upon by a

jury." 25 U.S. 19, 33 (1827). Justice Story wrote that the President's "discretion … is conclusive." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563 (1833) ("STORY"). *Fitzgerald* held President Nixon's official acts immune from suit years after he left office. 457 U.S. at 756.

Respondent cites cases upholding injunctive relief against *subordinate* officers. Resp.Br.39. Those cases are distinguishable on that very ground. Pet.Br.31-33. "The President's unique status … distinguishes him from other executive officials." *Fitzgerald*, 457 U.S. at 750. "This distinction … makes all the difference." *In re Trump*, 958 F.3d 274, 301 (4th Cir. 2020), *cert. granted, judgment vacated sub nom. Trump* v. *District of Columbia*, 141 S. Ct. 1262 (2021) (Wilkinson, J., dissenting).

Respondent argues that *Marbury* "discussed review of a subordinate's acts as an agent for the President," Resp.Br.39, but *Marbury* makes clear that it is the *President's* official acts that are "never … examinable by the courts." 5 U.S. at 166. Respondent also overlooks the inevitable "distortion of the Executive's 'decisionmaking process' with respect to official acts," *Trump* v. *Vance*, 140 S. Ct. 2412, 2426 (2020), and the "atmosphere of intimidation that would conflict with [his] resolve to perform [his] designated functions in a principled fashion," *Clinton* v. *Jones*, 520 U.S. 681, 693 (1997) (citation omitted).

Respondent argues that *Fitzgerald* and *Clinton* stated that courts "*can* exercise 'jurisdiction over the President.'" Resp.Br.40. Both cases, however, cite subpoenas issued to the President, which require the production of information only, and injunctive relief against subordinate officers. *Fitzgerald*, 457 U.S. at 753-54; *Clinton*, 520 U.S. at 703-04. These examples

do not involve courts sitting in judgment directly over the President's official acts, so they provide no counterexample to the immunity principle affirmed in *Marbury*, *Martin*, *Kendall* v. *U.S. ex rel. Stokes*, 37 U.S. 524 (1838), *Mississippi* v. *Johnson*, 71 U.S. 475 (1866), *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103 (1948), and *Fitzgerald*.

B. *Youngstown* Yields the Same Result.

Respondent cites Justice Jackson's framework in *Youngstown*. Resp.Br.10-11. That framework provides an "analytically useful" guideline, not rigid "pigeonholes." *Dames & Moore* v. *Regan*, 453 U.S. 654, 669 (1981). Here, it provides an imperfect fit, because it is designed to assess *affirmative* exercises of Executive "power," *Zivotofsky*, 576 U.S. at 10, not *defensive* powers such as the immunity principle recognized in *Marbury*. *See, e.g., id.*; *Dames & Moore*, 453 U.S. at 669. *Marbury*, not *Youngstown*, provides the relevant framework here.

Further, as applied here, *Youngstown*'s standard is circular. *Every* claim of criminal immunity is asserted against some statute, so the government will be able to invoke the "lowest ebb" factor in every instance—as it does here. Resp.Br.11. But this circularity is fatal. Invoking *Youngstown*'s third prong, Respondent presumes both that (1) the statutes charged in the indictment reflect "the express or implied will of Congress" to criminalize the President's official acts, and that (2) criminalizing them falls within the "constitutional powers of Congress." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). The first presumption contradicts *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), *infra* Part II; and the second contradicts *Marbury* and its progeny, *supra* Part I.A.

Moreover, even if it applied, the *Youngstown* framework would yield the same result. Under *Youngstown*'s third category, Congress may not infringe the President's "exclusive power[s]." *Zivotofsky*, 576 U.S. at 10. But the indictment here repeatedly seeks to infringe exclusive Presidential powers. Among others, it purports to criminalize President Trump's deliberations about whether to remove and appoint the Acting Attorney General, J.A.217, 219-20—thus infringing an "unrestrictable power" of the President. *Seila Law*, 140 S. Ct. at 2199; *see also In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997). The indictment purports to criminalize President Trump's urging DOJ to investigate and prosecute reported federal crimes, J.A.199, 203, 206-07—violating another "quintessentially executive function." *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting). The indictment purports to criminalize President Trump's public statements through official White House channels on matters of federal concern, J.A.181, 188, 190-92, 195, 197, 199, 202-07, 221, 223, 225-32—infringing the President's "extraordinary power to speak to his fellow citizens and on their behalf." *Trump* v. *Hawaii*, 585 U.S. 667, 701 (2018). The indictment purports to criminalize President Trump's communications with the Vice President and Members of Congress about their exercise of legislative authority, J.A.187, 220-27, 233-34—infringing his authority to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." U.S. CONST. art. II, § 3.

Next, Respondent objects that there is supposedly no "explicit textual source of immunity to the President." Resp.Br.12. On the contrary, criminal immunity reflects the original public meaning of the

Executive Vesting Clause and the Impeachment Judgment Clause. *See infra* Part I.C. As *Marbury* attests, its broad immunity principle was "originally understood as falling within the 'executive Power' of the Federal Government." *Zivotofsky*, 576 U.S. at 35 (Thomas, J., concurring in the judgment in part and dissenting in part). That is how "those who ratified the Constitution understood the 'executive Power' vested by Article II," and "[e]arly practice of the founding generation also supports this understanding." *Id.* at 37-38.

Respondent claims that immunity will place the President "above the law." Resp.Br.12. This slogan is "rhetorically chilling but wholly unjustified." *Fitzgerald*, 457 U.S. at 758 n.41; Pet.Br.35-37. "The remedy of impeachment," which *authorizes* criminal prosecution, "demonstrates that the President remains accountable under law for his misdeeds in office." *Id.* "It is simply error to characterize an official as 'above the law' because a particular remedy is not available against him." *Id.*; *see also Butz* v. *Economou*, 438 U.S. 478, 506 (1978). As George Mason urged, the "right of impeachment" ensures that the President shall not "be above Justice." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (Max Farrand ed. 1911) ("FARRAND"). As for the "extreme hypothetical" of a President who "murdered someone or committed some other dastardly deed," assuming that the deed involved official acts, "the President would be quickly impeached, tried, and removed; the criminal process then would commence against the President." Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2161 (1998).

C. The Impeachment Judgment Clause Confirms Immunity.

Impeachment has two possible outcomes: conviction and acquittal. By specifying that the "Party *convicted*" may be subject to criminal prosecution, the Clause necessarily excludes a Party who is *not* convicted. U.S. CONST. art. I, § 3, cl.7. That is the Clause's ordinary and natural meaning. SCALIA & GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012).

That is how the Founders understood this language. When Pennsylvania drafted a new constitution in 1825, James Wilson moved to change "the party convicted" in the draft to "the party, whether convicted or acquitted," to specify that a non-convicted party could be prosecuted. THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, at 254 (1825). Similarly, New York's 1777 constitution—which tracked the federal Clause—was amended in 1846 to replace "the party … convicted" with "the party impeached," thus reflecting the same understanding. S. CROSWELL & R. SUTTON, DEBATES AND PROCEEDINGS IN THE NEW-YORK STATE CONVENTION, FOR THE REVISION OF THE CONSTITUTION 436 (1846).

The Impeachment Judgment Clause thus reinforces *Marbury*'s immunity principle. Absent the exception recognized in the Clause—impeachment and Senate conviction—a President's official acts "can never be examinable by the courts." 5 U.S. at 166. By authorizing criminal prosecution only of the "Party convicted," the Founders crafted a carefully tailored exception to a well-established background rule prohibiting the prosecution of the Chief Executive. 2 FARRAND at 64-69.

Contrary to Respondent, Resp.Br.36, Sections 780-781 of Justice Story's *Commentaries* reinforce this conclusion. Story reasoned that if the Clause had not specified that "the Party convicted" could be prosecuted, it would "be a matter of extreme doubt, whether … a second trial for the same offence could be had, *either after an acquittal*, *or a conviction* in the court of impeachments." 3 STORY § 780 (emphasis added). Thus, on Story's view, the Clause means that subsequent prosecution is *not* available, except as authorized by the "Party convicted" exception. *Id.* When Story says in the next section that the Constitution has "subjected *the party* to trial in the common criminal tribunals," *id.* § 781 (emphasis added), "the party" refers to the Clause's "Party convicted," discussed immediately above.

Respondent argues that this interpretation is "at odds with [the] historical practice" regarding *subordinate* officers. Resp.Br.32-33. But the Framers intended that "this sequence should be mandatory only as to the President." *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 233 (2000). Whatever the legitimacy of such historical practice as to *subordinates*, it should not be extended to the President. Prosecuting a President whom the Senate never convicted is unprecedented and contradicts both the Clause's plain meaning and the Framers' undisputed intent. *See id.*; *Trump* v. *Anderson*, 601 U.S. 100, 113 (2024) (per curiam). Thus, "there are compelling reasons not to extend [that practice] to th[is] novel context" where it "lacks a foundation in historical practice and clashes with constitutional structure." *Seila Law*, 140 S. Ct. at 2192.

Respondent argues that impeachment "is inherently political." Resp.Br.34. So is prosecuting a current or former President. "Criminal investigations targeted at or revolving around a President are inevitably politicized by both their supporters and critics." Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1461 (2009). Respondent objects that "[t]he political alignment of Congress may prevent impeachment and conviction." Resp.Br.34. That is the point. The Framers required a nationwide *political* consensus—reflected in a two-thirds vote of the Senate—before authorizing the potentially Republic-shattering act of prosecuting a President for his official acts. *See* THE FEDERALIST NO. 65 (Hamilton).

Respondent worries that a hypothetical President might leave office and evade impeachment for official crimes. Resp.Br.34. But when the Framers erected the formidable hurdle of impeachment and conviction, they assumed the risk that some Presidential misfeasance might go unpunished. "While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty." *Morrison*, 487 U.S. at 710 (Scalia, J., dissenting). Thus, Speech and Debate immunity "has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers." *United States* v. *Brewster*, 408 U.S. 501, 516 (1972). Similarly, every constitutional protection for criminal defendants necessarily creates the risk that "a guilty man [may] go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

Respondent argues that DOJ's admission that "the prosecution of a President is 'necessarily political'" applies only to *sitting* Presidents, and politicization vanishes once the President leaves office. Resp.Br.35 (quoting 24 Op. O.L.C. at 230). In light of not one, but *four*, hyper-politicized prosecutions pending against President Trump—in addition to politically motivated civil cases—this argument cannot be taken seriously. It also contradicts President Ford's pardon statement on President Nixon. *See infra* Part I.D.

D. Historical Sources Support Immunity.

Respondent claims that criminal immunity "would have been anathema to the Framers." Resp.Br.10. Not so. The Framers viewed the prosecution of the Chief Executive as a radical innovation to be treated with great caution. Benjamin Franklin stated at the Constitutional Convention: "History furnishes one example only of a first Magistrate being formally brought to public Justice. *Every body cried out ag[ain]st this as unconstitutional*." 2 FARRAND at 65 (emphasis added). Far from insisting on unfettered prosecution, the Convention debate focused on whether the President should even be *impeachable* for his official acts, or whether periodic elections should provide the sole check against Presidential misfeasance. *Id.* at 64-69. At the debate's conclusion, Gouverneur Morris stated that, for his official acts, the President "should be punished not as a man, but as an officer, and punished only by degradation from his office." *Id.* at 69.

Respondent argues that "[s]ince the Founding, every President has known that he could be impeached" and then prosecuted. Resp.Br.13-14. But requiring impeachment and Senate conviction affords

the President formidable structural protection against politically motivated prosecutions. Indeed, Respondent admits that Senate conviction of a President "has never happened." Resp.Br.10. Stripping away that structural protection would inject "personal vulnerability," *Fitzgerald*, 457 U.S. at 753, into the President's most sensitive decisions and thus irreparably damage the Presidency.

Respondent cites James Wilson, Resp.Br.14, but Wilson stated that "far from being above the laws, [the President] is amenable to them in his private character as a citizen, and in his public character by *impeachment*." 2 THE DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 480 (J. Elliot ed. 1891) ("ELLIOT") (quoted in *Clinton*, 520 U.S. at 696). As *Clinton* explains, Wilson's statement means that "[w]ith respect to acts taken in his 'public character'—*that is, official acts*—the President may be disciplined principally by impeachment … . But he is otherwise subject to the laws for his *purely private acts*." 520 U.S. at 696 (emphases added). That is President Trump's position here.

Respondent cites James Iredell, Resp.Br.14, but like Wilson, Iredell distinguished "misdemeanor[s] in office"—*i.e.*, official acts, which are impeachable—from "crime[s] … punishable by the laws of this country." 4 ELLIOT at 109. Iredell stated: "If the President does a single act by which the people are prejudiced, he is punishable himself … . If he commits any misdemeanor in office, he is impeachable, removable from office, and incapacitated to hold any office of honor, trust, or profit. If he commits any crime, he is punishable by the laws of this country." *Id.* Iredell thus identified two kinds of "act[s]" for which a President is "punishable": (1)

"misdemeanor[s] in office," for which he is "impeachable," and (2) private "crime[s]," for which he is "punishable by the laws of this country." *Id.*

Respondent also cites Alexander Hamilton, Resp.Br.14-15, but in The Federalist Nos. 65, 69, and 77, Hamilton repeatedly stated that the President can be prosecuted only "after[]" and "subsequent to" impeachment and conviction, and that criminal prosecution is a "*consequence*" of Senate conviction. Pet.Br.17-18 (quoting all three essays). Respondent quotes The Federalist No. 77, Resp.Br.14, but there, Hamilton wrote that the President is "at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by *subsequent* prosecution in the common course of law" (emphasis added).

Respondent discusses common-law immunity, Resp.Br.42-44, but immunity doctrines safeguarding the independence of the coordinate branches of government—*i.e.*, legislative and judicial immunity—have always provided both civil and criminal immunity. *Spalding* v. *Vilas*, 161 U.S. 483, 494 (1896) (holding that judicial immunity "from a *civil suit or indictment* … has a deep root in the common law") (emphasis added). Legislators are thus immune from criminal prosecution for legislative acts. *United States* v. *Johnson*, 383 U.S. 169, 177-78 (1966). Judges, likewise, enjoy criminal immunity for *judicial* acts. Prosecutions of judges virtually always involve charges of bribe-taking, which is not an official act, *Brewster*, 408 U.S. at 526, and was always prosecutable at common law, *Perrin* v. *United States*, 444 U.S. 37, 43 (1979). In the rare cases of judges prosecuted for *judicial* acts, rather than bribery, those judicial acts are held immune. *United States* v.

Chaplin, 54 F. Supp. 926, 933-34 (S.D. Cal. 1944); *cf. Ex parte Virginia*, 100 U.S. 339, 348–49 (1879) (upholding a judge's indictment in part because the charged conduct was *not* "judicial action").

President Ford pardoned President Nixon, but President Nixon faced charges for private conduct, not just official acts. *The Legal Aftermath: Citizen Nixon and the Law*, TIME (Aug. 19, 1974), https://content.time.com/time/subscriber/article/0,33009,942980-1,00.html (investigation of Nixon included "subornation of perjury, tax fraud, misprision of a felony, [and] misuse of Government funds for his private home"). Moreover, President Ford correctly determined that the prosecution of a former President would be incurably divisive and destructive. Gerald Ford, *Presidential Statement* (Sept. 8, 1974), https://www.fordlibrarymuseum.gov/library/document/0122/1252066.pdf. Citing the "years of bitter controversy and divisive national debate," President Ford stated that "years will have to pass before Richard Nixon could hope to obtain a fair trial by jury in any jurisdiction of the United States," *id.* at 8; that in such a trial, "ugly passions would again be aroused, our people would again be polarized in their opinions, and the credibility of our free institutions of government would again be challenged," *id.* at 10; and that prosecuting the former President would "prolong the bad dreams that continue to reopen a chapter that is closed," *id.* at 13. Thus, Ford made the same judgment as the Framers, *see* THE FEDERALIST NO. 65—that the prosecution of a *former* President should not, and could not fairly, proceed in Article III courts.

The Special Counsel cites sources indicating that a sitting President may sometimes face prosecution after leaving office, Resp.Br.17, but sources that

considered immunity during the Clinton Presidency focus on the President's "private acts," not "official acts." *Clinton*, 520 U.S. at 696. Such sources do not indicate that a former President may be prosecuted for *official acts*. On the contrary, in defending a *sitting* President's immunity from prosecution, those sources provide many compelling justifications that apply just as forcefully to a *former* President's official acts—or even more so, because a former President does not have the innumerable powers afforded a sitting President, and thus he faces even greater "personal vulnerability." *Fitzgerald*, 457 U.S. at 753.

E. Historical Tradition Supports Immunity.

"Perhaps the most telling indication of a severe constitutional problem" with this prosecution "is a lack of historical precedent to support it." *Seila Law*, 140 S. Ct. at 2201 (cleaned up). Respondent tries to explain this away by arguing that President Trump's alleged conduct was supposedly "singular[ly] grav[e]." Resp.Br.40. Andrew Jackson—who believed he lost the Presidency to a "corrupt bargain," under which then-*President* Adams appointed Clay—might beg to differ. So might 120,000 Japanese-Americans unlawfully imprisoned during World War II, 36,000 Americans killed or wounded in Iraq, a 16-year-old U.S. citizen killed by President Obama's drone strikes, and the families of thousands of Americans who have died of fentanyl overdoses as a result of President Biden's disastrous border policies—among many others.

Respondent objects that President Trump cites no criminal statutes applicable to previous Presidents. Resp.Br.41-42. But an enterprising prosecutor can always "pick[] the man and then search[] the law

books … to pin some offense on him." Robert Jackson, *The Federal Prosecutor* (April 1, 1940). President Biden's immigration policies "encourage[] or induce[] … alien[s] to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is … in violation of law," 8 U.S.C. § 1324(a)(1)(A)(iv), on a massive scale. President Obama's drone strikes might be charged as the extraterritorial killing of U.S. citizens under 18 U.S.C. § 1119(b) or as murder under D.C. Code § 22-2101 *et seq*. So might President Clinton's "Wag the Dog" military strikes. President Roosevelt's unlawful internment of Japanese-Americans undoubtedly involved "transport[ing] … any person who shall have been unlawfully seized [or] confined." 47 Stat. 326 (1932), *as amended*, 48 Stat. 781 (1934). President Bush's alleged provision of false information to Congress to induce war in Iraq plainly constitutes "defrauding the United States" under 18 U.S.C. § 371 and "obstruction of an official proceeding" under 18 U.S.C. § 1512(c)(2), under Respondent's wrongful theory in this very case. *See also* Amandeep S. Grewal, *The President's Criminal Immunity* 77 S.M.U. L. REV. F. (forthcoming June 2024) (manuscript at 13-17), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4771662 (providing additional examples).

Respondent's blanket answer is to contend that all such statutes must be construed narrowly because "[a]ttempts by Congress to regulate the President's exercise of those authorities through the criminal laws would raise … serious separation-of-powers concerns." Resp.Br.42. That argument concedes his case, because the indictment here raises just such concerns. *See infra* Part II.

F. *Fitzgerald*'s Analysis Favors Immunity.

Respondent emphasizes "the compelling public interest in enforcing the criminal law." Resp.Br.19. "The notion that every violation of law should be prosecuted, including—indeed, especially—every violation by those in high places, is an attractive one," but "it is not an absolutely overriding value." *Morrison*, 487 U.S. at 732-33 (Scalia, J., dissenting). Enforcing the criminal law is not more compelling than vindicating the separation of powers mandated by the Constitution. "[T]he federal judiciary, no less than the President, is subject to the law. And here the federal judiciary," through the lower courts, "has sorely overstepped its proper bounds." *In re Trump*, 958 F.3d at 291 (Wilkinson, J., dissenting).

Respondent emphasizes that this prosecution is "brought by the Executive Branch itself." Resp.Br.5. "But the separation of powers does not depend on the views of individual Presidents, nor on whether 'the encroached-upon branch approves the encroachment,'" and the current President "cannot … bind his successors by diminishing their powers." *Free Enter. Fund*, 561 U.S. at 497 (citations omitted).

Respondent argues that "[r]obust safeguards" and DOJ's "[i]nstitutional standards" will guarantee "impartial prosecution" for the rest of America's future. Resp.Br.20. But the Framers foresaw that the prosecution of a President for "offenses which proceed from the misconduct of public men" would be inherently "POLITICAL," and would "agitate the passions of the whole community." THE FEDERALIST NO. 65 (Hamilton). The prosecution of a President is "necessarily political" and "unavoidably political." 24 Op. O.L.C. at 230. "Prosecution or nonprosecution of a President is … inevitably and unavoidably a

political act." Kavanaugh, 86 GEO. L.J. at 2159; Pet.Br.33-35. As current experience demonstrates, these observations hold true for a *former* President—especially one who is successfully campaigning (the most political act possible) to replace the incumbent whose administration is prosecuting him.

In fact, "[t]his prosecution is itself evidence of the danger in putting faith in government representations of prosecutorial restraint." *Stevens*, 559 U.S. at 480. For example, the Special Counsel cites DOJ's "[i]nstitutional standards of impartial prosecution" in the Justice Manual, Resp.Br.20-21, while ignoring his own violation of those standards in attempting to push this case to trial before the 2024 Presidential election. Br. in Opp. in No. 23-624, at 23-24; Stay Reply 3-4; Jack Goldsmith, *The Consequences of Jack Smith's Rush to Trial*, Lawfare (Feb. 14, 2024), https://www.lawfaremedia.org/article/the-consequences-of-jack-smith's-rush-to-trial; Elie Honig, *Why Jack Smith Will Never Say the 'E' Word*, CNN (Dec. 16, 2023), https://www.cnn.com/videos/politics/2023/12/16/smr-honig-on-smith-vs-election-calendar.cnn. This Court should not rely here "on the Government's discretion to protect against overzealous prosecutions ... ." *McDonnell* v. *United States*, 579 U.S. 550, 576 (2016) (quotations omitted).

The Special Counsel invokes the procedural protections of the criminal process. Resp.Br.21-22. But safeguards against meritless claims in *civil* cases, though somewhat less robust, are still formidable, yet *Fitzgerald* upheld absolute immunity in that context. Moreover, in criminal cases, the process *itself* is a severe punishment, due to "[t]he peculiar public

opprobrium and stigma that attach to criminal proceedings." 24 Op. O.L.C. at 250.

Finally, Respondent argues that "Article III courts—including this Court—provide the ultimate check against potentially abusive prosecutions." Resp.Br.22. But the Founders carefully considered and *rejected* the proposal that the trial of a President for official acts should proceed in Article III courts—precisely because such a trial is inherently political. 2 FARRAND at 550-51; THE FEDERALIST NO. 65 (Hamilton). Moreover, "the ideas and themes discussed in explaining why the Senate was superior to the Supreme Court in passing *public* judgment upon the conduct of the President apply, *a fortiori*, to a single prosecutor attempting to do so." Kavanaugh, 86 GEO. L.J. at 2160 n.78.

II. *Franklin*'s Clear-Statement Rule Applies.

Respondent contends that "the terms 'whoever' and 'person'" in the statutes in question cover the President's official acts. Resp.Br.24. That contradicts the "longstanding interpretive presumption that 'person' does not include the sovereign." *Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 780 (2000); *see also* 1 U.S.C. § 1 (defining "person" and "whoever" without referencing government officials); *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); SCALIA & GARNER, at 273. This argument also contradicts *Franklin*. The APA's definition of "agency" applies far more naturally to the President than any statute here, *see* 505 U.S. at 800 (quoting 5 U.S.C. § 701(b)), yet *Franklin* held that "textual silence is not enough to subject the President to the provisions of the APA," *id.* at 800-01.

Next, Respondent contends that "Congress knows how to exclude the President." Resp.Br.25. But Respondent's own examples show that "Congress knows how" to *include* the President explicitly in a criminal statute, *see id.* (citing 18 U.S.C. §§ 227, 607(a)(1))—yet Congress did not do so in the statutes charged in the indictment. Respondent argues that "[n]o evidence exists that Congress intended" to *exclude* the President from general criminal laws, *id.*, but that argument flips the presumption on its head. "Out of respect for the separation of powers and the unique constitutional position of the President," this Court looks for "an express statement by Congress," not "textual silence." *Franklin*, 505 U.S. at 800-01 (emphasis added).

Respondent argues that Congress did not "exempt[]" the President from statutes "barring bribery, murder, treason, and seditious conspiracy." Resp.Br.25. But such crimes are virtually always applied to "purely private" conduct, not "official acts." *Clinton*, 520 U.S. at 696; *see also Brewster*, 408 U.S. at 526 ("Taking a bribe" is "not a legislative act"). A President who committed murder, treason, or bribery through *private* acts is subject to prosecution upon leaving office. But when President Obama killed U.S. citizens through an *official act*—a lethal drone strike—he could be prosecuted only if he was first impeached and convicted by the Senate. J.A.164.

Respondent argues that the clear-statement rule applies only to "a serious risk of infringing the constitutional powers of the Executive Branch." Resp.Br.26. But the indictment here seeks to criminalize President Trump's exercise of core "constitutional powers." *Supra* Part I.B. Moreover, *Franklin* embodies the broader principle that "where

an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). That principle is broad enough to justify reading federal statutes reasonably to avoid deciding "a fundamental question at the heart of our democracy," Pet. in No. 23-624, at 2, for the first time in American history. *Cf. Boynton* v. *Virginia*, 364 U.S. 454, 457 (1960); *Neese* v. *S. Ry. Co.*, 350 U.S. 77, 78 (1955).

III. Respondent's Alternative Proposals Are Meritless.

Respondent contends that the Court should remand for immediate trial even if criminal immunity exists. Resp.Br.44-45. But Respondent repeatedly admits that the indictment charges the "use of official power." Resp.Br.46; *id.* at 45. The only *overt* conduct that Respondent attempts, and fails, to identify as supposedly unofficial conduct is the alleged organization of alternate slates of electors. Resp.Br.46-47.[2] Thus, Respondent effectively admits that this hypothetical trial would rest, largely or exclusively, on *immune* official acts.

Respondent contends that President Trump may still be tried because these official acts were supposedly motivated by a private *purpose*. He argues that the official acts furthered "a *private end*." Resp.Br.44 (emphasis added). Likewise, he argues

[2] Respondent errs; this conduct constitutes official Presidential action. D.Ct. Doc. 74, at 42-45.

that President Trump's "use of official power" was supposedly a "means of achieving a *private aim*" and "in service of [a] *private aim*." Resp.Br.45-46 (emphasis added).

This argument contradicts this Court's precedents. Pet.Br.48-49 (citing many cases). Immunity does not turn on "the motivation for actual performance of [official] acts." *Brewster*, 408 U.S. at 509. "The claim of an unworthy purpose does not destroy the privilege." *Johnson*, 383 U.S. at 180 (citation omitted). Immunity "would be of little value if [immune officials] could be subjected to … the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951). The President "should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry." *Fitzgerald*, 457 U.S. at 745.

Alternatively, Respondent asks this Court to remand to the district court to "make evidentiary rulings" and "craft … jury instructions" to allow the "jury [to] consider official-acts evidence for limited and specified purposes." Resp.Br.46. But the government may not "inquire[] into the motives" for official acts *at all*. *Johnson*, 383 U.S. at 176. Evidence of official acts is "inadmissible evidence." *Id.* Immunity prevents "judicial inquiry" into official acts "made in the course of a prosecution." *Id.* at 177. *Johnson* thus held that "all references to" immune acts must be "eliminated," and the indictment must be "wholly purged of elements offensive" to immunity. *Id.* at 185.

Likewise, in *Brewster*, this Court held that "the Government's case" could "not rely on legislative acts or the motivation for legislative acts." 408 U.S. at 512.

Immunity "precludes any showing of how [the official defendant] acted, voted, or decided." *Id.* at 527. "[E]vidence of acts protected by the Clause is inadmissible." *Id.* at 528.

Respondent suggests that President Trump could seek "appellate review" of immunity rulings "after final judgment." Resp.Br.48. But immunity determinations cannot be deferred until after trial. This Court "stresse[s] the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991). Because immunity is "an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009) (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985)).

If the Court upholds criminal immunity without dismissing outright, it should remand to address whether each act in the indictment is shielded by immunity, with evidence if necessary, before any further proceedings. *See Blassingame* v. *Trump*, 87 F.4th 1, 29 (D.C. Cir. 2023).

CONCLUSION

The Court should reverse the D.C. Circuit's judgment.

April 15, 2024

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