No. 23-624

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
DONALD J. TRUMP
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF ALABAMA AND 18 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT DONALD J. TRUMP

STEVE MARSHALL
Attorney General

OFFICE OF THE ALABAMA ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@AlabamaAG.gov

EDMUND G. LACOUR JR.
Solicitor General
Counsel of Record

ROBERT M. OVERING
Deputy Solicitor General

DYLAN MAULDIN
Ass't Solicitor General

Counsel for *Amici* States
(additional counsel listed in addendum)

DECEMBER 20, 2023

QUESTION PRESENTED

Whether the United States has made an extraordinary showing that this case justifies "deviation from normal appellate practice" and requires "immediate determination" by this Court. Sup. Ct. R. 11.

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INTEREST OF *AMICI* STATES*

The States of Alabama, Alaska, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming respectfully submit this brief as *amici curiae* in support of Respondent Donald J. Trump. The issue before the Court is a narrow one. While the question of a president's immunity from prosecution is self-evidently important, the question here is whether the "public" interest "require[s] immediate determination" of that question. Sup. Ct. R. 11. As agents of the public, *Amici* States offer a different perspective than the federal government on whether the public interest is served by the prosecution's extraordinary request.

The United States' petition repeatedly proclaims—but never explains why—"[i]t is of imperative public importance that respondent's claims of immunity be resolved by this Court and that respondent's trial proceed as promptly as possible if his claim of immunity is rejected." Pet.2. That silence is both telling and troubling, suggesting that the United States' demand for extraordinary and immediate relief is driven by partisan interests, not the public interest.

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* *Amici* substantially complied with Supreme Court Rule 37's notice requirement by providing all parties notice of their intention to file this brief on December 11, 2023.

SUMMARY OF ARGUMENT

A petition for a writ of certiorari before judgment is "granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Presenting an "important question" is not enough. *See* Sup. Ct. R. 10(c). The petitioner must also show a "public" need for "immediate" action by the Court. Sup. Ct. R. 11. Few petitions have ever satisfied this immediacy requirement.

Unsurprisingly, when the United States has previously petitioned for a writ of certiorari before judgment, it has spelled out the timing concerns that justify immediate review.

Surprisingly, the petition here does not. To be sure, the United States declares it "of imperative public importance that respondent's claims of immunity be resolved" immediately so that if the claim is rejected, President Trump's trial can "proceed as promptly as possible." Pet.2. But the United States never explains why waiting a few additional months for the Court of Appeals to decide this issue would damage the public interest. Instead, the United States offers only a tautology: if the Court agrees to review the case sooner, it can review the case sooner. That is no reason to justify the prosecution's "extraordinary request." *Id.* at 10.

Which naturally raises the question of what the real reason is for demanding an extraordinary "deviation from normal appellate practice." Sup. Ct. R. 11. President Trump, of course, is currently "a political

candidate for the Republican presidential nomination."[1] And the United States waited more than thirty months to charge him for the conduct alleged in the indictment. The petition's repeated appeals to the March 4, 2024 trial date thus suggest a partisan purpose, not a public one. Any such reason would be an improper basis for invoking this Court's rarely exercised power to review before judgment, deviating from the normal appellate process, or for rushing to prosecute a criminal defendant. This Court demands the petitioner to show an "imperative *public* importance," not an importance to a particular political candidate or party. Sup. Ct. R. 11 (emphasis added). Because the United States has failed to show a public interest justifying this Court's immediate intervention in this case, the petition should be denied.

ARGUMENT

I. The Petition Fails To Satisfy Supreme Court Rule 11's Immediacy Requirement.

A. Rule 11's immediacy requirement is rarely satisfied.

No one disputes that the question of presidential immunity is a matter of tremendous public significance. But Rule 11 makes clear that the gravity of a case is not enough to bypass "normal appellate practice." Sup. Ct. R. 11. A petitioner seeking certiorari before judgment must also show that the issue of "imperative public importance" demands an "immediate determination" by this Court. *Id.*

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[1] *United States v. Trump*, No. 23-3190, 2023 WL 8517991, at *22 (D.C. Cir. Dec. 8, 2023).

Rule 11's immediacy requirement reflects that this Court "is one of final review, not of first view." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (cleaned up); *see also United States v. Mendoza*, 464 U.S. 154, 160 (1984) (describing "the benefit [this Court] receives from permitting … courts of appeals to explore a difficult question before this Court grants certiorari"). An extraordinary writ, such as a writ of certiorari before judgment, is "reserved for really extraordinary causes, in which an appeal is clearly an inadequate remedy." *In re McDonald*, 489 U.S. 180, 185 (1989) (cleaned up). Accordingly, a case warranting immediate review is an "extremely rare occurrence," *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers), and years often pass between grants of such a petition. *See* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 130 & n.43 (2019).

The Court deviates from normal appellate practice only when there is a truly urgent need. For instance, the Steel Seizure Case arose amid the Korean War. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 590 (1952). Steel production was crucial to the war effort, but the steel workers declared a strike that "immediately jeopardize[d] our national defense." *Id.* at 582-83. To avoid "catastrophe," the federal government seized "most of the Nation's steel mills." *Id.* at 582. After the district court entered a preliminary injunction against the federal government, this Court granted certiorari just three days later. *Id.* at 584. The Court heard argument within nine days and decided the case within weeks. *Id.* at 584.

The Iranian hostage crisis represented another exigency requiring the Court's swift action. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981). The President had reached an agreement with Iran, securing the release of 52 American hostages. *Id.* at 660, 664-66. But the "lower courts had reached conflicting conclusions on the validity of the President's actions," risking the possibility that Iran would "consider the United States to be in breach." *Id.* at 660. Given the danger of prolonging conflict with Iran, the Court granted certiorari before judgment, set an expedited schedule, and decided the case "on the narrowest possible ground." *Id.*

War and hostilities present paradigm cases where certiorari before judgment is appropriate. *See also Ex parte Quirin*, 317 U.S. 1 (1942) (reviewing military jurisdiction over Nazi spies during World War II).

B. The United States has long recognized and relied upon Rule 11's immediacy requirement.

When the United States previously sought certiorari before judgment, it recognized the need to show urgency. The petition's authorities illustrate the point. *See* Pet.12.

First, in *Department of Commerce v. New York*, it was clear that "time [was] of the essence" because there was no way normal appellate review would finish in time for the decennial census. *See* Pet. at 13-14, No. 18-966. Within months, the Department of Commerce would begin printing and mailing questionnaires to millions of households. *Id.* Once complete, the once-in-a-decade process would have "massive and

lasting consequences" with "no possibility of a do-over." *Id.* at 13. Thus, certiorari before judgment was "the only way to protect this Court's opportunity for plenary review." *Id.* at 14.

Second, in *Biden v. Nebraska* (and its companion case, *Department of Education v. Brown*), the United States stressed the "urgency of providing guidance to borrowers who need to know whether they will be required to resume payments in a matter of weeks." Appl. at 37, No. 22-506. Delayed review would have left "vulnerable borrowers in untenable limbo." *Id.*

Third, in *United States v. Texas*, the federal government argued that a nationwide vacatur entered weeks prior was already "disrupting DHS's efforts to focus its limited resources on the noncitizens who pose the gravest threat to national security, public safety, and the integrity of our Nation's borders." Appl. at 3, No. 22-58. According to the United States, the case was part of an "explosion of state suits seeking nationwide relief," "enmesh[ing] the Judiciary in policy disputes between States and the federal government." *Id.* at 4-5.

Fourth, in *Whole Woman's Health v. Jackson*, 595 U.S. 30, 35 (2021), the Court granted certiorari before judgment after the federal government had alleged imminent perils in another suit challenging the same law. *See* Pet. at 37-38, *United States v. Texas*, No. 21-588. In that case, the United States claimed that Texas "ha[d] already … nullif[ied] this Court's precedents for six weeks" and that its "scheme" would "spread to other States or other rights [] without this Court's review." *Id.* at 38.

Similarly, when a party opposing the United States fails to explain why time is of the essence, the government relies on Rule 11 to oppose the petition. *See, e.g.,* BIO at 15-16, *Am. Ins. for Int'l Steel, Inc. v. United States*, No. 18-1317 (opposing certiorari for lack of "exigent circumstances warranting this Court's immediate intervention"); BIO at 12-13, *Mount Soledad Memorial Ass'n v. Trunk*, No. 13-1061 (opposing certiorari despite "unquestionably … great public importance" because the challenged order had been stayed); BIO at 17-19, *Virginia v. Sebelius*, No. 10-1014 (opposing certiorari, despite issues that "must be and will be decided in this Court" because normal appellate review did not "present[] risks of extraordinary disruption and irreparable harm"); BIO at 10, *Hamdan v. Gates*, No. 06-1169 (opposing certiorari because the petitioner had not shown "irreparable harm of a nature that would warrant immediate review").[2]

C. The United States' argument for an immediate determination is tautological.

Here, the federal government's proffered rationale pales in comparison to the exigencies that it usually offers and demands under Rule 11. The petition asserts that certiorari before judgment is necessary "to afford this Court an opportunity to grant review now." Pet.10. Otherwise, "it is unclear whether this Court would be able to hear and resolve the threshold

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[2] When the Little Sisters of the Poor sought certiorari before judgment, the United States told this Court that "[t]he lack of even one court of appeals decision addressing the merits of [their] claim is reason enough to deny their petition for certiorari before judgment." BIO at 35, *Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13A691.

immunity issues during its current Term." Pet.9-10. The "ordinary process … may not result in a final decision for many months," which "might prevent this Court from hearing and deciding the case this Term." Pet.11.

That's not an argument. It's a tautology: If the Court does not "review now," it cannot "review now." But why is it imperative to review now?

One searches the petition in vain for an answer. The best the United States offers is that immediate review would permit "respondent's trial [to] proceed as promptly as possible." Pet.2. Of course, *Amici* States do not dispute the "public interest in a broad sense" in the "prompt disposition of criminal charges." Pet.11 (quoting *Strunk v. United States*, 412 U.S. 434, 439 n.2 (1973)). Indeed, every "prosecutor should act with diligence and promptness to investigate, litigate, and dispose of criminal charges." ABA Standards for Criminal Justice 3-1.9(a) (4th ed. 2017). But such generalities, which could be said of every prosecution, fall far short of the Rule 11 standard.

The government has not shown an urgent need *in this case*. Is there a war, a hostage negotiation, or a border crisis at issue? No. And the petition cites no authority for its position that some prosecutions must go so quickly that a criminal defendant loses his right to an orderly appeal. The government's recitation of the trial date (Pet.2, 4, 9, 11, 13) is quite meaningless as every prosecution that goes to trial has a trial date.

Even in other prosecutions that the federal government has deemed to be of tremendous public importance—even in ones involving January 6—the

United States has let the appellate process play out in the normal course. In *United States v. Fischer*, No. 22-3038 (D.C. Cir.), for example, the government did not seek certiorari before judgment and did not oppose the defendant-appellee's motion for additional time on appeal. In fact, the government itself sought an extension in this Court. *See* Motion, *Fischer v. United States*, No. 23-5572 (docketed Oct. 3, 2023). That case has now been pending for almost three years, *see* DE1, *United States v. Fischer*, No. 1:21-cr-00234-CJN (filed February 17, 2021), despite its implications for this prosecution and many others.[3] Presumably many cases now on appeal once had trial dates too.

The petition's principal authority is *United States v. Nixon*, but that case is easily distinguished. 418 U.S. 683 (1974). First, both parties in *Nixon* sought certiorari before judgment, *id.* at 686, whereas here, the United States alone asks to short-circuit appeal. Second, President Nixon was not a defendant but the recipient of a third-party subpoena. *Id.* The Court granted certiorari to avoid an imminent conflict between the President and the judiciary; otherwise, the normal appellate process would require the President "to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review." *Id.* at 691. Because that would be "unseemly" and "present an unnecessary occasion for constitutional confrontation," the Court granted

[3] Mr. Fischer's petition, which was granted on December 13, 2023, concerns the scope of 18 U.S.C. § 1512(c)(2), an issue that implicates at least two of the charges against President Trump. *See* DE1, Indictment ¶¶125-28.

certiorari before the district court could cite President Nixon for contempt. *Id.* at 692.

There is no comparable exigency here. There would be nothing "unseemly" about ordinary appellate review and no "confrontation" caused by postponing further prosecution until this appeal is resolved. Again, the United States' entire argument is that the Court should act to preserve the trial date of March 4, 2024. Without more, that cannot be the showing required for certiorari before judgment.

D. The absence of a public reason for immediate review suggests a partisan reason.

While it has no legal significance here, the United States' preferred trial date has tremendous political significance. The trial schedule's coincidence with the presidential primaries has not been lost on the public or the press. Devoid of argument, the petition practically begs the public (and the Court) to consider the political consequences.[4] And President Biden's own

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[4] *See, e.g.*, Jesse Wegman, *The Supreme Court Can Stop Trump's Delay Game*, N.Y. Times (Dec. 14, 2023), https://www.nytimes.com/2023/12/14/opinion/supreme-court-trump-delay.html ("The American people deserve to know, well before they head to the polls, whether one of the two probable major-party candidates for president is a convicted criminal."); Jan Wolfe & C. Ryan Barber, *Trump's Jan. 6 Case Put on Hold, Imperiling March 4 Trial Date*, Wall St. J. (Dec. 13, 2023), https://www.wsj.com/us-news/law/trumps-jan-6-case-put-on-hold-imperiling-march-4-trial-date-7b6e4b9e; Paula Reid, *'This is huge': Reporter breaks down Jack Smith's Supreme Court request*, CNN (Dec. 11, 2023), https://www.cnn.com/videos/politics/2023/12/11/jack-smith-supreme-court-donald-trump-immunity-request-reid-sot-ip-vpx.cnn ("If a question like this goes

remarks at the start of the investigation did not help. Asked how to reassure foreign leaders that "the former President will not return," the current President responded: "Well, we just have to demonstrate that he will not take power … if he does run. I'm making sure he, under legitimate efforts of our Constitution, does not become the next President again."[5] The following week, the Special Counsel was appointed to oversee this case.[6]

"Normal order should prevail," the United States insisted in the district court. DE15 at 8. But nothing about this prosecution has been normal. After the August 1 indictment, the United States demanded that jury selection begin in *December*. DE23. Shortly thereafter, the prosecution produced over 11 million pages of documents—discovery derived from the investigations of multiple agencies and branches of government, hundreds of witness interviews, and dozens of

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through the normal channels, it can take months, possibly well over a year to decide this, which could push that trial until after the election."); Benjamin Wittes, *Lawfare Live: Trump's Trials and Tribulations*, The Lawfare Institute (Dec. 14, 2023), at 41:30-42:15 www.youtube.com/watch?v=VT-pw2miQ8Q ("The reason the March 4th trial date matters is because of the November election date; otherwise we wouldn't really care.").

[5] *See Remarks by President Biden in Press Conference*, The White House (Nov. 9, 2022), www.whitehouse.gov/briefing-room/speeches-remarks/2022/11/09/remarks-by-president-biden-in-press-conference-8/.

[6] *See* Dep't of Just., *Appointment of a Special Counsel* (Nov. 18, 2022), www.justice.gov/opa/pr/appointment-special-counsel-0. By that point, investigation had been "ongoing" for some time. *See* Department of Justice Order No. 5559-2022 at (b), (c) (Nov. 18, 2022).

search warrants—while continuing the plea for an urgent trial. The rush to trial follows a period of two-and-a-half years in which the United States could have brought its case.[7]

In the defense's view, the federal government wants "a show trial, not a speedy trial." DE38 at 18:15. The district court assured that President Trump "will be treated exactly, with no more or less deference, [as] any other defendant would be treated." *Id.* at 33:6-8; *see also id.* at 53:4-6. But the same court compared this case to "the Boston Marathon bombing" and "the September 11 attacks." *Id.* at 56:1-4.[8] Citing President Trump's "considerable resources," *id.* at 20:17, the government's neatly "organized" discovery, *id.* at 53:7-8, and its own prediction that the defense wouldn't "review all 12 million pages" anyway, *id.* at 23:10; 28:14-15, the district court largely acquiesced to the United States and set trial for March 4, 2024. The court later remarked that its "trial will not yield to the election cycle." DE142 at 2-3 (quoting DE103 at 20-21).

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[7] In the court below, the United States suggested that the timing of its case was the result of a "decision by the government to forbear prosecution over a period several years." DE141 at 12 (quoting *United States v. Oseguera Gonzalez*, 507 F. Supp. 3d 137, 177 (D.D.C. 2020)). To justify the trial date of March 4, the district court repeatedly counted the prosecution's self-imposed delay against the defendant. *See* DE38 at 28:21-25, 29:1-6, 53:15-22, 55:2-4, 55:23-25.

[8] In another proceeding, the district court hearing this case described the events of January 6 as "an attempt to violently overthrow the government" out of "blind loyalty to one person who, by the way, remains free to this day." DE50 at 2.

On December 1, the district court denied President Trump's motion to dismiss based on immunity, and the United States sought an expedited appeal. *See* CADC Doc. 2030867 at 2, 4 (citing "public interest" and "common procedure in interlocutory appeals"). Without explanation, the D.C. Circuit set a very uncommon schedule—an opening brief to be due on Saturday, December 23, a response brief due the following Saturday, December 30, and the reply brief due on January 2. *See* CADC Doc. 2031419.

Still, the United States wants more than a compressed trial schedule and an expedited appeal. To keep its inviolable trial date, the United States seeks one more departure from normalcy: its admittedly "extraordinary request" that this Court bypass the ordinary appellate process and step into the fray. Pet.10. The petition presents a novel question "vital to our democracy," a question about the "cornerstone of our constitutional order," a question the federal government wants answered "as promptly as possible." Pet.8-10. Rather than allay fears about the political motive for this filing, the United States amplifies them. Repeating "March 4" over and over (Pet.2, 4, 9, 11, 13) invites the inference that the petition's true purpose is partisan, not public.

It should go without saying that interference with President Trump's political campaign is not a legitimate reason to seek certiorari before judgment. "The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict." ABA Standards for Criminal Justice 3-1.2(b) (4th ed. 2017). And a "prosecutor should not permit the prosecutor's

professional judgment or obligations to be affected by the prosecutor's … political … interests." *Id.* 3-1.7(f).

All criminal defendants have a right to a fair and orderly process. The gravity of this particular prosecution is all the more reason to ensure that right. For reasons unknown, the prosecution has sought and secured an expedited trial and an expedited appeal. But this Court's Rule 11 requires more than a vague government interest in speedy trials. The United States has not shown that its plan to take President Trump to trial on March 4, 2024, "is of such imperative public importance as … to require immediate" intervention by this Court. Sup. Ct. R. 11.

CONCLUSION

The Court should deny the petition for a writ of certiorari before judgment.

Respectfully submitted,

STEVE MARSHALL
Attorney General

OFFICE OF THE ALABAMA ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@AlabamaAG.gov

EDMUND G. LACOUR JR.
Solicitor General
Counsel of Record

ROBERT M. OVERING
Deputy Solicitor General

DYLAN MAULDIN
Ass't Solicitor General

December 20, 2023

(additional counsel listed below)

ADDITIONAL COUNSEL

TREG TAYLOR
Attorney General
State of Alaska

ASHLEY MOODY
Attorney General
State of Florida

RAÚL R. LABRADOR
Attorney General
State of Idaho

THEODORE E. ROKITA
Attorney General
State of Indiana

BRENNA BIRD
Attorney General
State of Iowa

DANIEL CAMERON
Attorney General
Commonwealth of Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

LYNN FITCH
Attorney General
State of Mississippi

ANDREW BAILEY
Attorney General
State of Missouri

AUSTIN KNUDSEN
Attorney General
State of Montana

MICHAEL T. HILGERS
Attorney General
State of Nebraska

DREW WRIGLEY
Attorney General
State of North Dakota

ALAN WILSON
Attorney General
State of South Carolina

MARTY J. JACKLEY
Attorney General
State of South Dakota

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

PATRICK MORRISEY
Attorney General
State of West Virginia

BRIDGET HILL
Attorney General
State of Wyoming