IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CASE NO. 23SC188947
	:	
DONALD JOHN TRUMP,	:	Judge: Scott McAfee
	:	
Defendant.	:	

MOTION TO DISMISS THE INDICTMENT BASED ON PRESIDENTIAL AND SUPREMACY CLAUSE IMMUNITY AND SUPPORTING MEMORANDUM OF LAW

President Trump moves this Court to dismiss the indictment in this case, and in support relies on this memorandum of law.

INTRODUCTION

From 1789 to 2023, no President ever faced criminal prosecution for acts committed while in office. That unbroken historic tradition of presidential immunity is rooted in the separation of powers and the text of the Constitution. In *Nixon v. Fitzgerald*, the Supreme Court held that a former President has "absolute presidential immunity from [civil] damages liability for acts within the 'outer perimeter' of his official responsibility." 457 U.S. 731, 756 (1982) (quoting *Barr v. Matteo*, 360 U.S. 564, 575 (1959) (plurality opinion)). The same immunity shields President Trump from criminal prosecution for acts within the "outer perimeter" of his official duties. *Id.* The indictment in this case charges President Trump for acts that lie at the heart

of his official responsibilities as President. The indictment is barred by presidential immunity and should be dismissed with prejudice. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989) ("Dismissal of the indictment is the proper sanction when a defendant has been granted immunity from prosecution ….").

The President's absolute immunity shields him from criminal prosecution as well as civil suit. Indeed, immunity from prosecution is most central to the concept of official immunity. Presidential immunity from criminal prosecution for official acts has deep roots in the separation of powers and principles of federalism, just as *Fitzgerald* held for civil immunity. The text of the Constitution and early authorities confirm that the exclusive method to proceed against a President for crimes allegedly committed in office is by impeachment in the House of Representatives and trial in the Senate. Early authorities such as Chief Justice Marshall and Justice Story recognize that the President's official acts are not subject to examination by any state or federal court. Historical practice over 234 years confirms that the power to indict a current or former President for official acts does not exist. The Supreme Court's analogous immunity doctrines—including presidential immunity from civil suit, legislative immunity, and absolute judicial immunity—confirm that the President is immune from criminal prosecution for official acts. Such immunity is particularly appropriate for the President because the Presidency involves especially sensitive

duties, requires bold and unhesitating action, and would be crippled by the threat of politically motivated prosecutions.

The acts alleged in the indictment lie squarely within the "outer perimeter" of the President's official duties. In fact, they lie at the very heart of presidential responsibility. Making statements to the public on matters of national concern—especially matters involving core federal interests, such as the administration of a federal election—lies in the heartland of the President's historic role and responsibility. Communicating with the U.S. Department of Justice about investigations pursuant to federal election law is a quintessential exercise of the President's authority under the Take Care Clause. Communicating with state officials about the administration of a federal election and urging them to exercise their official responsibilities with respect to that election are also core exercises of presidential responsibility. So, too, urging the Vice President and Members of Congress to exercise their official responsibilities consistent with the President's view of the public good is authorized by the Constitution and lies at the heart of the President's constitutional and historic role. Organizing slates of electors in furtherance of that effort to have Congress exercise its responsibilities falls within the President's official duties as well.

Presidential immunity applies regardless of subjective intent. *Id.* at 745-46. The "allegation of malicious or corrupt motives," not present here, does not affect a

public official's immunity from suit. *Spalding v. Vilas*, 161 U.S. 483, 494 (1896). "The motive that impelled [the official] to do that of which the plaintiff complains is … wholly immaterial." *Id.* at 498. Moreover, immunity protects a public official from allegations that he or she made false statements in the course of official duties. *Barr*, 360 U.S. at 574-75. The conduct charged in the indictment falls under the aegis of presidential immunity, and the indictment must be dismissed.

ALLEGATIONS IN THE INDICTMENT

President Trump does not admit the truth of any allegations in the indictment in this motion and memorandum. Rather, this memorandum sets forth the factual allegations in the indictment so this Court may assess their legal significance as it relates to President Trump's motion to dismiss based on presidential immunity. The Supreme Court has "repeatedly … stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Anderson v. Creighton*, 483 U.S. 635, 646, n. 6 (1987)); and *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). Accordingly, this motion addresses only the question of presidential and supremacy clause immunity.

The indictment alleges that President Trump took a series of actions that form the basis of its charges. These acts fall into five basic categories. The indictment

alleges that President Trump, while in office: (1) made public statements and posted Tweets on Twitter about the administration of the 2020 federal election; (2) communicated with Department of Justice ("DOJ") officials about investigating and reporting election fraud; (3) communicated with state officials generally, and Georgia public officials specifically, about the administration of the federal election and their exercise of official duties with respect to it; (4) communicated with the Vice President in his legislative capacity as President of the Senate about the exercise of his official duties regarding the election certification; and (5) somehow participated in the effort to organize contingent slates of electors in Georgia (and several other states), in furtherance of attempts to convince the Vice President to exercise his official authority in President Trump's favor.

A. Public Statements and Tweets About the Federal Election and Certification.

First, the indictment alleges that President Trump, while he was still President, made a long series of public statements about the administration of the 2020 federal election, including expressions of concern about fraud in the federal election—including speeches, public statements, and Tweets posted on Twitter. *See* Indictment, at 20 ("Act 1") (alleging that President Trump made a speech about the results of the federal election as "an overt act in furtherance of the conspiracy"); *id.* at 24 ("Act 22") (alleging that President Trump posted a Tweet about ongoing hearings in the Georgia legislature about the federal election); *id.* at 26 ("Act 26")

(alleging that President Trump posted a Tweet about ongoing testimony in the Georgia legislature about the federal election); *id.* at 26 ("Act 27") (alleging that President Trump posted a Tweet about election fraud in Georgia in the federal election); *id.* at 27 ("Act 32") (alleging that President Trump posted a Tweet about the Georgia Governor calling a special session of the state legislature regarding the federal election); *id.* at 39 ("Act 75") (alleging that President Trump posted a Tweet about the Georgia Governor calling a special session of the Georgia legislature about the federal election); *id.* at 46 ("Act 100") (alleging that President Trump posted a Tweet about an ongoing hearing in the Georgia legislature about election fraud in the federal election); *id.* at 46 ("Act 101") (alleging that President Trump posted a Tweet about an ongoing hearing in the Georgia legislature about election fraud in the federal election); *id.* at 48 ("Act 106") (alleging that President Trump posted a Tweet about election fraud in the federal election in Georgia); *id.* at 52 ("Act 114") (alleging that President Trump posted a Tweet about election fraud and the Georgia Secretary of State's conduct regarding the federal election in Georgia); *id.* at 60 ("Act 128") (alleging that President Trump posted a Tweet about the Vice President's authority regarding the certification of the federal election); *id.* at 61 ("Act 133") (alleging that President Trump issued a public statement about the Vice President's role in certifying the federal election); *id.* at 62 ("Act 135") (alleging that President Trump made a public speech about fraud in the federal election, the

administration of the federal election, and the certification of the federal election results); *id.* at 63 ("Act 138") (alleging that President Trump posted a Tweet about the certification of the federal election and the Vice President's authority); *id.* at 63 ("Act 139") (alleging that President Trump posted a Tweet about fraud in the federal election and the certification of the federal election).

B. Communications with the U.S. Department of Justice About Investigating and Reporting Federal Election Crimes.

The indictment alleges that President Trump communicated with the U.S. Department of Justice about investigating and reporting federal election crimes and considered appointing a special counsel to investigate such federal election crimes. *Id.* at 18 (alleging that President Trump urged the Acting Attorney General to state that the election was corrupt); *id.* at 45 ("Act 97") (alleging that President Trump urged the Acting U.S. Attorney General and Acting U.S. Deputy Attorney General to make public statements about election fraud); *id.* at 43 ("Act 90") (alleging that President Trump considered appointing a special prosecutor for investigating federal election crimes).

C. Communications with State Officials About the Federal Election and the Exercise of Their Official Duties with Respect to the Federal Election.

The indictment alleges that President Trump engaged in a series of communications with state officials in Georgia and other States about the administration of the federal election and the exercise of their official duties with

respect to the federal election. *Id.* at 21 ("Act 5") (alleging that President Trump and his White House Chief of Staff met with Michigan legislators in the White House about fraud in the federal election in Michigan); *id.* at 21 ("Act 7") (alleging that President Trump participated in a telephone call with the Speaker of the Arizona House of Representatives about fraud in the federal election and about his exercise of official duties with respect to electors); *id.* at 21 ("Act 8") (alleging that President Trump joined a meeting with Pennsylvania legislators about fraud in the federal election and about their appointment of electors in the federal election); *id.* at 22 ("Act 9") (alleging that President Trump met with Pennsylvania legislators in the White House and discussed holding a special session of the Pennsylvania General Assembly); *id.* at 23 ("Act 14") (alleging that President Trump placed a phone call to the President Pro Tempore of the Pennsylvania Senate to discuss the appointment of federal electors in Pennsylvania); *id.* at 23 ("Act 17") (alleging that President Trump joined a telephone call with Arizona legislators to discuss fraud in the federal election); *id.* at 27 ("Act 28") (alleging that President Trump met in the Oval Office with the Speaker of the Pennsylvania House of Representatives about holding a special session of the Pennsylvania legislature); *id.* at 27 ("Act 30") (alleging that President Trump placed a phone call to the President Pro Tempore of the Georgia Senate); *id.* at 27 ("Act 31") (alleging that President Trump placed a phone call to the Georgia Governor to urge him to call a special session of the Georgia legislature);

id. at 29 ("Act 40") (alleging that President Trump asked for the contact information of the leaders of Georgia's legislature); *id.* at 30 ("Act 42") (alleging that President Trump urged the Speaker of the Georgia House of Representatives to call a special session of the Georgia General Assembly to appoint presidential electors); *id.* at 30 ("Act 43") (alleging that President Trump called the Attorney General of Georgia to discuss election fraud and to discuss a lawsuit challenging the administration of the federal election); *id.* at 44 ("Act 93") (alleging that President Trump placed a phone call to the Chief Investigator for the Georgia Secretary of State to urge her to investigate election fraud in the federal election); *id.* at 45 ("Act 95") (alleging that President Trump placed a phone call to the Speaker of the Arizona House of Representatives to urge him to appoint Arizona presidential electors); *id.* at 50 ("Act 112") (alleging that President Trump urged the Georgia Secretary of State to exercise his official responsibility with respect to certifying the federal election a certain way); *id.* at 51 ("Act 113") (alleging that President Trump discussed fraud in the federal election with the Georgia Secretary of State and his staff).

D. Communications with the Vice President About the Exercise of His Official Duties in the Election-Certification Proceedings.

The indictment also alleges that President Trump made a series of communications with the Vice President in his legislative capacity as President of the Senate regarding the Vice President's exercise of official duties in the federal election-certification proceedings. *Id.* at 24 ("Act 19") (alleging that President

Trump requested another individual to prepare a strategy memo for communicating with the Vice President about the exercise of his official duties regarding the certification of electors); *id.* at 48 ("Act 107") (alleging that President Trump received another memo about the Vice President's authority with respect to the federal election certification); *id.* at 57 ("Act 123") (alleging that President Trump met with the Vice President, the Vice President's Chief of Staff, and the Vice President's General Counsel regarding the exercise of the Vice President's official responsibilities in certifying the federal election); *id.* at 61 ("Act 130") (alleging that President Trump met with the Vice President about the exercise of the Vice President's official responsibilities regarding the federal election); *id.* at 61 ("Act 131") (alleging that President Trump placed a phone call to the Vice President about the exercise of the Vice President's official responsibilities regarding the federal election); *id.* at 61 ("Act 132") (alleging that President Trump placed another phone call to the Vice President about the exercise of the Vice President's official responsibilities regarding the federal election); *id.* at 63 ("Act 140") (alleging that President Trump spoke with the Vice President about fraud in the federal election and the exercise of the Vice President's official authority).

E. Requesting Contingent Slates of Electors to Further President Trump's Communications with the Vice President.

Closely related to these communications with the Vice President, the indictment alleges that other individuals organized a contingent slate of electors

from Georgia. The indictment alleges only one action that President Trump supposedly took with respect to this effort. *Id.* at 30 ("Act 44") (alleging that President Trump placed a phone call to the RNC Chairwoman to request her assistance in organizing contingent slates of electors). The indictment alleges that this and other contingent slates of electors were adopted to provide justification to convince the Vice President to exercise his official responsibility, in his role as President of the Senate, regarding the election certification in President Trump's favor. *See, e.g.*, *id.* at 32 ("Act 51"); *id.* at 57 ("Act 123") (alleging that President Trump urged the Vice President that he had authority to "either reject electoral votes … or delay the joint session of Congress … for the purpose of allowing certain state legislatures to unlawfully appoint presidential electors" in President Trump's favor); *id.* at 61 ("Act 129") (alleging that others urged Vice President Pence to "reject slates of presidential electors from Georgia"); *id.* at 61 ("Act 131") (alleging that President Trump urged the Vice President to "reject slates of presidential electors or return the slates of presidential electors to state legislatures"); *id.* at 61 ("Act 132") (similar allegation regarding Pennsylvania).[1]

[1] The other counts in the indictment against President Trump are based on a subset of these alleged underlying acts and are thus subject to the same deficiencies discussed herein with respect to the other counts. *See* Count 5 – Solicitation of Violation of Oath by a Public Officer, *id.* at 74, based on "Act 42," *id.* at 30; Count 9 – Conspiracy to Commit Impersonating a Public Officer, *id.* at 76, based on "Act 44," *id.* at 30; Count 11 – Conspiracy to Commit Forgery in the First Degree, *id.* at 77, based on "Act 44," *id.* at 30; Count 13 – Conspiracy to Commit False Statements and Writings, *id.* at 78, based on "Act 44," *id.* at 30; Count 15 – Conspiracy to Commit Filing False Documents, *id.* at 79, based on "Act 44," *id.* at 30; Count 17 – Conspiracy to Commit Forgery in the First

ARGUMENT

I. PRESIDENT TRUMP'S PROSECUTION IS BARRED BY PRESIDENTIAL IMMUNITY

PART 1

President Trump has Absolute Immunity from Criminal Prosecution for Actions Performed Within the "Outer Perimeter" of His Official Responsibility.

"In view of the special nature of the President's constitutional office and functions," a current or former President has "absolute presidential immunity from [civil] damages liability for acts within the 'outer perimeter' of his official responsibility." *Fitzgerald*, 457 U.S. at 756 (quoting *Barr*, 360 U.S. at 575). The question whether such presidential immunity includes immunity from *criminal prosecution* for the President's official acts is a "'serious and unsettled question' of law." *Id.* at 743 (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 547 (1949)). In addressing this question, the court should consider the same sources that the Supreme Court relied upon in *Fitzgerald*: the Constitution's text, structure, and original meaning, English common law, historical practice, the Court's

Degree, *id.* at 80, based on "Act 44," *id.* at 30; Count 19 – Conspiracy to Commit False Statements and Writings, *id.* at 81, based on "Act 44," *id.* at 30; Count 28 – Solicitation of Violation of Oath by Public Officer, *id.* at 87, based on "Act 112," *id.* at 50; Count 29 – False Statements and Writings, *id.* at 88, based on "Act 113," *id.* at 51. *But see* Count 38 – Solicitation of Violation of Oath by Public Officer, *id.* at 95, based on "Act 156," *id.* at 68; Count 39 – False Statements and Writings, *id.* at 96; based on "Act 157," *id.* at 68.

precedents and immunity doctrines, and considerations of public policy. *See id.* at 747. All these strongly favor a finding of immunity here.

A. The Doctrine of Separation of Powers and the President's Unique Role in Our Constitutional Structure Require Immunity from Criminal Prosecution.

First, *Fitzgerald* emphasized the President's unique role in our constitutional structure of separated powers. *Fitzgerald* considered the "policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers." *Fitzgerald*, 457 U.S. at 748. *Fitzgerald* held that the question of presidential immunity implicates "the special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers." *Id.* at 743. Further, it held that the President's "absolute immunity from damages liability predicated on his official acts" constitutes "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* at 749.

"The President occupies a unique position in the constitutional scheme." *Id.* at 749. "Article II, § 1, of the Constitution provides that '[t]he executive Power shall be vested in a President of the United States....' "The President's unique status under the Constitution distinguishes him from other executive officials." *Id.* at 750.

Thus, "the singular importance of the President's duties" entails that "diversion of his energies by concern with" criminal prosecution "would raise unique risks to the effective functioning of government." *Id.* at 751. "[A] President must concern himself with matters likely to 'arouse the most intense feelings.'" *Id.* at 752 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)). "[I]t is in precisely such cases that there exists the greatest public interest in providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office." *Id.* (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)). "This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system." *Id.*

"Nor can the sheer prominence of the President's office be ignored." *Id.* at 752-53. "In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for" criminal prosecution in countless federal, state, and local jurisdictions across the country. *Id.* at 753. "Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.*

The potential, if not correctly proscribed by the courts, ability of federal, state, and local elected officials to attack and hamper the President by criminally prosecuting him for official acts, and the threatened authority of federal and state

courts and juries to sit in judgment over his official acts, poses a grave threat to both the vertical and horizontal separation of powers. It allows the President's political opponents to sap his strength and freedom of action. For this very reason, *Fitzgerald* recognized that presidential immunity is not just a creature of common law but also "rooted in the separation of powers under the Constitution." *Id.* at 753 (quoting *United States v. Nixon*, 418 U.S. 683, 708 (1974)).[2]

This logic mirrors the justification for legislative immunity. That doctrine "was intended to secure for the Legislative Branch of the Government the freedom from executive and judicial encroachment which had been secured in England in the Bill of Rights of 1689 and carried to the original Colonies." *Scheuer v. Rhodes*, 416 U.S. 232, 240–41 (1974) (overruled on other grounds by *Davis v. Scherer*, 468 U.S. 183 (1984)). Indeed, "the central role of the Speech or Debate Clause" is "to prevent intimidation of legislators by the Executive and accountability before a possibly

[2] *Fitzgerald* did not decide whether presidential immunity extends to criminal prosecution, and it acknowledged that "there is a lesser public interest in actions for civil damages than … in criminal prosecutions." 457 U.S. at 754 n.37. But the fact that the doctrine of presidential immunity is rooted in the separation of powers—both the horizontal separation of powers between the branches of the federal government, and the vertical separation of powers between the federal government and the States—dictates that immunity must extend to criminal prosecution as well as civil liability. While the "public interest … in criminal prosecutions" may be important, *id.*, it is not important enough to justify abrogating the separation of powers, the most fundamental structural feature of our constitutional system. Further, exposure to criminal prosecution poses a far greater threat than the prospect of civil lawsuits to the President's "maximum ability to deal fearlessly and impartially with the duties of his office," and thus it raises even greater "risks to the effective functioning of government." *Fitzgerald*, 457 U.S. at 753 (citation and quotation marks omitted). *Fitzgerald*'s reasoning, therefore, entails that presidential immunity includes immunity from both civil suit and criminal prosecution.

hostile judiciary." *Gravel v. United States*, 408 U.S. 606, 617 (1972) (quoting *United States v. Johnson*, 383 U.S. 169, 181 (1966)). Likewise, the privilege protecting presidential communications "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Nixon*, 418 U.S. at 708.

These concerns have special force here, where a local prosecutor answerable to a small subset of the United States' electorate has filed criminal charges seeking to second-guess the official actions of a President of the United States. Allowing these state and local officials to hamstring federal executive power threatens principles of federalism and the *vertical* separation of powers between the federal government and the States. "Perhaps the principal benefit of the federalist system is a check on abuses of government power." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Id.* (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and

abuse from either front." *Id.* There is no "healthy balance of power between the States and the Federal Government" when any locally elected prosecutor in the country—including those elected in enclaves of profound hostility to the Chief Executive—has the authority to haul the President into court on *criminal charges* for his official acts. *Id.* On the contrary, "the Constitution guarantees 'the entire independence of the General Government from any control by the respective States.'" *Trump v. Vance*, 140 S. Ct. 2412, 2425 (2020) (quoting *Farmers and Mechanics Sav. Bank of Minneapolis v. Minnesota*, 232 U.S. 516, 521 (1914)). Thus, "States have no power ... to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress." *Id.* (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 436 (1819)). This division of federal and state power provides a "doubly security … to the rights of the people," which requires "a proper balance between the States and the Federal Government." *Gregory*, 501 U.S. at 458 (quoting, in part, THE FEDERALIST No. 51 (Madison)). "In the tension between federal and state power lies the promise of liberty." *Id.*

This is no mere empty threat. The current Fulton County, Georgia indictment of President Trump threatens to open the floodgates of politically motivated criminal prosecutions of virtually every future President. "There are more than 2,300 local prosecutors and district attorneys in the country." *Vance*, 140 S. Ct. at 2447 (Alito, J., dissenting). These prosecutors represent and are answerable only to local

interests. That allowance would overlook the *national* "communal character" of the Presidency. The Presidency "implicate[s] a uniquely important national interest, because the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Anderson v. Celebrezze*, 460 U.S. 780, 794–95 (1983). The President constitutes "a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J. concurring). He is responsible for directing the entire Executive Branch and, in the field of foreign affairs, is "the sole organ of the federal government ... ." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). This *nationwide* interest in the Presidency makes it particularly inappropriate for a jury drawn from a *local* "commun[ity]," J.A.620, to sit in judgment over the President's official acts.

"If a sitting President is intensely unpopular in a particular district—and that is a common condition—targeting the President may be an alluring and effective electoral strategy. But it is a strategy that would undermine our constitutional structure." *Id.* "Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naive, ineffective, but, in all probability, 'crooks.' And nothing so effectively gives an appearance of validity to such charges as a [criminal] investigation and, even better, prosecution." *Morrison v. Olson*, 487 U.S. 654, 713 (1988) (Scalia, J., dissenting). "The present

[indictment] provides ample means for that sort of attack, assuring that massive and lengthy investigations" and prosecutions "will occur," bedeviling every future presidential administration and ushering in a new era of political recrimination and division. *Id.*

B. Impeachment and Conviction by the Senate Provide the Sole Exclusive Method of Proceeding Against a President for Crimes in Office.

The concept of presidential immunity from criminal prosecution for official acts is also rooted in the text of the Constitution. The Impeachment Judgment Clause provides that the President may be charged by indictment only in cases where the President has been impeached and convicted by trial in the Senate. Here, President Trump was *acquitted* by the Senate for the same conduct, so he retains immunity from criminal prosecution based on the same acts or occurrences.

The Impeachment Judgment Clause of Article I provides that "Judgment in Cases of Impeachment shall not extend further than to removal from Office … but *the Party convicted* shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. CONST. art. I, § 3, cl. 7 (emphasis added). Because the Constitution specifies that only "the Party *convicted*" by trial in the Senate may be "liable and subject to Indictment, Trial, Judgment and Punishment," *id.*, it presupposes that a President who is *not* convicted may *not* be subject to criminal prosecution. As Justice Alito recently noted, "[t]he plain

implication" of this Clause "is that criminal prosecution, like removal from the Presidency and disqualification from other offices, is a consequence that can come about only after the Senate's judgment, not during or prior to the Senate trial." *Vance*, 140 S. Ct. at 2444 (Alito, J., dissenting). "This was how Hamilton explained the impeachment provisions in the Federalist Papers. He wrote that a President may 'be impeached, tried, and, upon conviction ... would afterwards be liable to prosecution and punishment in the ordinary course of law.'" *Id.* (quoting THE FEDERALIST No. 69, p. 416 (C. Rossiter ed. 1961)); *see also* THE FEDERALIST No. 77, p. 464 (A. Hamilton) (a President is "at all times liable to impeachment, trial, [and] dismission from office," but any other punishment must come only "by subsequent prosecution in the common course of law"). This interpretation is also consistent with ordinary English usage—in a situation involving only two possible outcomes (conviction or acquittal), the Clause specifies a legal implication for one outcome, implying that that implication does *not* apply to the other outcome. *See* SCALIA & GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, § 10, at 107 (2012) ("When a car dealer promises a low financing rate to 'purchasers with good credit,' it is entirely clear that the rate is *not* available to purchasers with spotty credit.").

"James Wilson—who had participated in the Philadelphia Convention at which the document was drafted—explained that … the President … 'is amenable

to [the laws] in his private character as a citizen, and *in his public character by impeachment*.'" *Clinton v. Jones*, 520 U.S. 681, 696 (1997) (emphasis added) (quoting 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 480 (2d ed. 1863)) (cleaned up). "With respect to acts taken in his 'public character'—that is, official acts—the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws for his purely private acts." *Id.*; *see also* THE FEDERALIST No. 43 (J. Madison); THE FEDERALIST No. 65 (A. Hamilton).

The Supreme Court has applied this principle to federal judges: "But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, *the judges of these courts can only be reached by public prosecution in the form of impeachment*, or in such other form as may be specially prescribed." *Bradley v. Fisher*, 80 U.S. 335, 354 (1871) (emphasis added). And *Fitzgerald* reinforced this conclusion as to the President:

> A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action…. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain

> prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

Fitzgerald, 457 U.S. at 757. Notably absent from *Fitzgerald*'s list of "formal and informal checks on Presidential action," *id.*, is the threat of state criminal prosecution for his official acts.

Here, President Trump is not a "Party convicted" in an impeachment trial by the Senate, just the opposite. U.S. CONST. art. I, § 3, cl. 7. In January 2021, he was impeached for the very same conduct at issue in the indictment. H. RES. 24 (117th Cong. 1st Sess.), *available at* https://www.congress.gov/bill/117th-congress/house-resolution/24/text. President Trump was acquitted of these charges after trial in the Senate, and he thus remains immune from prosecution.

C. Early Authorities Support Presidential Immunity from Criminal Prosecution.

In *Marbury v. Madison*, Charles Lee—Attorney General of the United States under Presidents George Washington and John Adams—"declare[d] it to be my opinion, grounded on a comprehensive view of the subject, that the President is not amenable to *any court of judicature* for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution," *i.e.*, impeachment. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 149 (1803) (emphasis added). In his opinion for the Court, Chief Justice Marshall endorsed this view: "By the constitution of the United States, the President is invested 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, and to his own conscience." *Id.* at 165–66. In cases involving the President's official duties, "whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive." *Id.* at 166. "The acts of such an officer, as an officer, can never be examinable by the courts." *Id.* (referring to a subordinate officer of the Executive Branch precisely following the will of the President) When the President "act[s] in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable." *Id.* If the President "acts in a case, in which executive discretion is to be exercised … any application to a court to control, in any respect, his conduct, would be rejected without hesitation." *Id.* at 170–71.

Justice Story cited *Marbury v. Madison* for this point in his 1833 treatise:

> There are other incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability. *In the exercise of his*

> *political powers he is to use his own discretion, and is accountable only to his country, and to his own conscience. His decision, in relation to these powers, is subject to no control; and his discretion, when exercised, is conclusive.*

3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES ch. 37, § 1563 (1833), *available at* https://lonang.com/library/reference/story-commentaries-us-constitution/sto-337/ (visited January 8, 2024) (emphasis added).

Likewise, *Martin v. Mott* held that, "[w]hen the President exercises an authority confided to him by law," his conduct cannot be second-guessed by a jury: "If the fact of the existence of the exigency were averred, it would be traversable, and of course might be passed upon by a jury; and thus the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury." 25 U.S. (12 Wheat.) 19, 32-33 (1827); *cf. Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (holding that the immunity of Members of Congress "would be of little value if they could be subjected to … the hazard of a judgment against them based upon a jury's speculation as to motives").

D. Two Hundred Thirty-Four Years of History and Tradition Support Presidential Immunity from Criminal Prosecution.

In *Nixon v. Fitzgerald*, the Supreme Court emphasized that "the presuppositions of our political history," including "tradition[s] well grounded in

history and reason," are highly relevant in defining the scope of presidential immunity. 457 U.S. at 745; *see also Tenney*, 341 U.S. at 372.

Here, 234 years of unbroken historical practice—from 1789 until 2023—provide powerful evidence that the power to indict a former President for his official acts does not exist. No prosecutor, whether state, local, or federal, has this authority; and none has sought to exercise it until now. American history teems with situations where the opposing party passionately *believed* that the President and his closest advisors were guilty of criminal behavior in carrying out their official duties—John Quincy Adams' "corrupt bargain" with Henry Clay provides a prime example. In every such case, the outraged opposing party eventually took power, yet none ever brought criminal charges against the former President based on his exercise of official duties. Nor did *any* state or local prosecutor of the thousands of such officials throughout the United States seek to indict a President.

A strong historical practice of *not* exercising a purported power—especially when there has been ample incentive and opportunity to do so—undercuts the sudden discovery and assertion of the newly minted power. *See, e.g., NFIB v. OSHA*, 142 S. Ct. 661, 666 (2022) (per curiam) ("It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind…. This 'lack of historical precedent' … is a 'telling indication' that the mandate extends beyond the agency's legitimate reach.") (citation omitted); *Seila*

Law LLC v. CFPB, 140 S. Ct. 2183, 2201 (2020) (same); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) (same); *Printz v. United States*, 521 U.S. 898, 916 (1997) ("To complete the historical record, we must note that there is not only an absence of executive-commandeering statutes in the early Congresses, but there is an absence of them in our later history as well, at least until very recent years."). "The constitutional practice … tends to negate the existence of the … power asserted here." *Printz*, 521 U.S. at 918.

E. Analogous Immunity Doctrines Support Presidential Immunity from Criminal Prosecution.

Analogous immunity doctrines strongly support the conclusion that absolute presidential immunity extends to immunity from criminal prosecution.

1. Presidential immunity from civil suits.

First, *Nixon v. Fitzgerald* itself provides a close analog for the immunity asserted here. *Fitzgerald* held that the President—including a former President—enjoys absolute immunity from civil liability for conduct within the "outer perimeter" of his official duties. 457 U.S. at 756. The inference that immunity from mere *civil* liability should also encompass immunity from *criminal* liability is compelling. In their common-law origins, immunity doctrines extended to both civil and criminal liability: "The immunity of federal executive officials began as a means of protecting them in the execution of their federal statutory duties from criminal or civil actions based on state law." *Butz v. Economou*, 438 U.S. 478, 489 (1978).

Common-law immunity doctrines encompassed the "privilege … to be free from arrest or civil process," *i.e.*, criminal and civil proceedings alike. *Tenney*, 341 U.S. at 372. In fact, immunity from criminal prosecution is *more* fundamental to the concept of official immunity than is immunity from suits for civil damages: "[I]t is apparent from the history of the [Speech and Debate] clause that the privilege was not born primarily of a desire to avoid private suits …, but rather to *prevent intimidation by the executive and accountability before a possibly hostile judiciary*." *Johnson*, 383 U.S. at 180–81 (emphasis added). Thus, *Johnson* held that criminal prosecution for official acts—not civil liability—was the "chief fear" that led to the adoption of legislative immunity. *Id.* at 182. The same reasoning applies here to Presidential immunity.

2. Legislative Immunity for Members of Congress.

In *Johnson*, the Supreme Court granted absolute immunity from criminal prosecution to Members of Congress for acts within the scope of their legislative duties. *Johnson*, 383 U.S. at 180. Speech and Debate immunity resembles presidential immunity because it serves a unique role in preserving the separation of powers in our constitutional structure. *Tenney*, 341 U.S. at 376. Thus, "a Member [of Congress]'s conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil *or criminal* judgment against a Member because that conduct is

within the 'sphere of legitimate legislative activity.'" *Gravel*, 408 U.S. at 624 (emphasis added). Presidential immunity serves no less important a role in "our scheme of government," *Tenney*, 341 U.S. at 377, than legislative immunity.

3. Absolute judicial immunity.

Likewise, absolute judicial immunity protects state and federal judges from criminal prosecution, as well as civil suits, based on their official judicial acts. In *Spalding v. Vilas*, the Supreme Court noted that the doctrine of judicial immunity extends to both "civil suit" and "indictment." 161 U.S. 483, 494 (1896) (quoting *Yates v. Lansing*, 5 Johns. 282, 291 (N.Y. 1810) (Kent, C.J.)). *Pierson* held that "[t]his immunity applies even when the judge is accused of acting maliciously and corruptly." *Pierson*, 386 U.S. at 554; *see also Fitzgerald*, 457 U.S. at 745-46. At common law, judicial immunity included immunity from criminal prosecution. "In the case of courts of record … it was held, certainly as early as Edward III.'s reign [1326-1377], that a litigant could not go behind the record, in order to make a judge civilly *or criminally* liable for an abuse of his jurisdiction." J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 884 (emphasis added) (quoting 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 235-36 (2d ed. 1937)); *see also id.* at 887 n.39 (quoting 77 Eng. Rep. at 1307). In the few cases where prosecutors have brought criminal charges against judges for their judicial acts, courts have rejected them. *See, e.g.*, *United States v. Chaplin*, 54 F.

Supp. 926, 928 (S.D. Cal. 1944) (holding that judicial immunity barred the criminal prosecution of a judge who was "acting in his judicial capacity and within his jurisdiction in imposing sentence and probation upon a person charged with an offense in his court to which the defendant has pleaded guilty"). Reviewing many authorities, *Chaplin* concluded that absolute immunity shielded the judge from criminal prosecution as well as civil suit. *Id.* at 934 (holding that criminal prosecution of judges for judicial acts "would … destroy the independence of the judiciary and mark the beginning of the end of an independent and fearless judiciary"). The same reasoning applies to the President here.

F. Concerns of Public Policy Favor the President's Immunity from Prosecution for Official Acts.

In considering presidential immunity, the Supreme Court "has weighed concerns of public policy, especially as illuminated by our history and the structure of our government." *Fitzgerald*, 457 U.S. at 747–48. Here, public policy overwhelmingly supports the finding of immunity.

1. The Presidency involves "especially sensitive duties."

First, the Supreme Court emphasizes the necessity of robust immunity for officials who have "especially sensitive duties," such as prosecutors and judges. *Fitzgerald*, 457 U.S. at 746 (citing *Imbler*, 424 U.S. 409 and *Stump v. Sparkman*, 435 U.S. 349 (1978)). No one exercises more sensitive duties than the President: "Under the Constitution and laws of the United States the President has discretionary

responsibilities in a broad variety of areas, many of them highly sensitive." *Id.* at 756.

2. The Presidency requires "bold and unhesitating action."

Second, the Supreme Court reasons that immunity is most appropriate for officials from whom "bold and unhesitating action" is required. *Id.* at 745; *see also Imbler*, 424 U.S. at 423-24, 427-28 (holding that prosecutors must enjoy absolute immunity to ensure "the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system"). "[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties," and subject them "to the constant dread of retaliation." *Barr*, 360 U.S. at 571–72 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.)) In *Vance*, the Supreme Court noted this concern was central to its adoption of absolute immunity for the President, holding that *Fitzgerald* "conclud[ed] that a President … must 'deal fearlessly and impartially with the duties of his office'—not be made "unduly cautious in the discharge of [those] duties' by the prospect of civil liability for official acts." *Vance*, 140 S. Ct. at 2426. The threat of criminal prosecution poses an even greater risk of deterring bold and unhesitating action than the threat of civil suit.

3. Criminal charges could "cripple" Executive administration.

The Supreme Court emphasizes that, "[i]n exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would *seriously cripple the proper and effective administration of public affairs* as entrusted to the executive branch of the government, if he were subjected to any such restraint." *Fitzgerald*, 457 U.S. at 745 (quoting *Spalding*, 161 U.S. at 498) (emphasis added); *see also Barr*, 360 U.S. at 573 (holding that official immunity is "designed to aid in the effective functioning of government"). "Frequently acting under serious constraints of time and even information," a President inevitably makes many important decisions, and "[d]efending these decisions, often years after they were made, could impose unique and intolerable burdens…." *Imbler*, 424 U.S. at 425–26; *see also Barr*, 360 U.S. at 571 (expressing concern that suits would "inhibit the fearless, vigorous, and effective administration of policies of government"). The President's "focus should not be blurred by even the subconscious knowledge" of the risk of future prosecution. *Imbler*, 424 U.S. at 427. And "[t]here is no question that a criminal prosecution holds far greater potential for distracting a President and diminishing his ability to carry out his responsibilities than does the average civil suit." *Vance*, 140 S. Ct. at 2452 (Alito, J., dissenting).

Far more than civil liability, the threat of criminal prosecution undermines the President's "maximum ability to deal fearlessly and impartially with the duties of his office." *Fitzgerald*, 457 U.S. at 751 (citation and quotation marks omitted)*; see Vance*, 140 S. Ct. at 2428 ("The Supremacy Clause prohibits state judges and prosecutors from interfering with a President's official duties. . . . Any effort to manipulate a President's policy decisions or to 'retaliat[e]' against a President for official acts . . . would thus be an unconstitutional attempt to 'influence' a superior sovereign 'exempt' from such obstacles." (citations omitted)).

4. The Presidency would be "harassed by vexatious actions."

Another key purpose of immunity for officials is to "prevent them being harassed by vexatious actions." *Spalding*, 161 U.S. at 495 (quotation omitted). In *Imbler*, the Supreme Court held that the common-law immunity of prosecutors rests on the "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." 424 U.S. at 423; *see also Butz*, 438 U.S. at 512. The President, as the most high-profile government official in the country, is most likely to draw politically motivated ire, and most likely to be targeted for harassment by vexatious actions. *See Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 369 (2004) (recognizing "the paramount necessity of protecting the Executive Branch from vexatious

litigation that might distract it from the energetic performance of its constitutional duties."); *Fitzgerald*, 457 U.S. at 752-53 ("Nor can the sheer prominence of the President's office be ignored."). While *Vance* held that this principle was not alone sufficient to shield the President from a criminal subpoena for private records, 140 S. Ct. at 2426, the rationale provides additional support for a finding of official immunity—as *Fitzgerald*, *Spalding*, *Butz*, *Imbler*, and similar cases held. As noted above, this concern is heightened in this case, where one of 2,300 local prosecutors in the United States has brought criminal charges against a former President for his official acts. This break with two centuries of historical precedent virtually ensures that all future Presidents will suffer similar prosecutions by state and local prosecutors in locales of the greatest political hostility to them.

PART 2

The Indictment Alleges Only Acts Committed Within the Outer Perimeter of the President's Official Responsibilities, Which Are Shielded by Absolute Immunity.

Given the President's absolute immunity from criminal prosecution for any acts within the "outer perimeter" of his official duties, the indictment must be dismissed. The indictment is based entirely on alleged actions that lie at the heartland of the President's official duties. [3]

[3] President Trump acknowledges at the outset that counts 38 and 39, based on overt acts 156 and 157 in count 1, respectively, allege post-presidency conduct. *See* Indictment, at 68 ("Act 156") (alleging that President Trump, on September 17, 2021, urged the Georgia Secretary of State to

A. The Scope of Criminal Immunity Includes All Actions that Fall Within the "Outer Perimeter" of the President's Official Duties.

In *Nixon v. Fitzgerald*, the Supreme Court held that civil presidential immunity shields the President from liability for any "acts within the 'outer perimeter' of his official responsibility." *Fitzgerald*, 457 U.S. at 756 (quoting *Barr*, 360 U.S. at 575). The Supreme Court adopted this expansive scope of immunity precisely because any "functional" test would be inconsistent with the broad scope of the President's duties. *Id.* at 756. As the Supreme Court held, "the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails." *Barr*, 360 U.S. at 573.

As the highest of all posts with the broadest of all duties, the Presidency warrants the broadest possible immunity, *id.*, and acts fall within its "outer perimeter" unless there is no colorable claim whatsoever that they are presidential in character. In the context of presidential civil immunity, "[a]bsolute immunity is extended to few officers, and it is denied only if the officer acts '*without any*

"decertify[] the election, or whatever the correct legal remedy is, and announce the true winner"); *id.* at 68 ("Act 157") (alleging that President Trump, on September 17, 2021, made a statement to the Georgia Secretary of State claiming that there were "false and irregular votes" in the federal election in Georgia); s*ee also* n.2, *infra*. Consequently, counts 38 and 39 are not the subject of this specific motion to dismiss. But as argued in his First Amendment as applied post-hearing brief, these statements, which are included within the same September 17th letter President Trump wrote to SOS Raffensperger, are plainly protected by the First Amendment, and cannot plausibly form the basis of any prosecution of President Trump. *See, e.g., United States v. Alvarez*, 567 U.S. 709, 715-23 (2012) (plurality op.). Moreover, count 1, the RICO conspiracy charge, would not survive this specific motion to dismiss because President Trump's alleged association with the claimed "criminal enterprise" and its averred "manner and means" would be completely undermined and eviscerated.

colorable claim of authority.'" *Klayman v. Obama*, 125 F. Supp. 3d 67, 86 (D.D.C. 2015) (quoting *Bernard v. Cnty. of Suffolk*, 356 F.3d 495, 504 (2d Cir. 2004)) (emphasis added).

The "outer perimeter" of presidential action encircles a huge swath of territory, because the scope of the President's duty and authority in our constitutional system is uniquely and extraordinarily broad. Article II of the Constitution vests the President with "the executive Power" and the duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, §§ 1, 3. The President's duties include "supervisory and policy responsibility of utmost discretion and sensitivity," which "include the enforcement of federal law." *Fitzgerald*, 457 U.S. at 750. The President's "duties, which range from faithfully executing the laws to commanding the Armed Forces, are of unrivaled gravity and breadth," and "[q]uite appropriately, those duties come with protections that safeguard the President's ability to perform his vital functions." *Vance*, 140 S. Ct. at 2425. "Article II 'makes a single President responsible for the actions of the Executive Branch.'" *Free Enter. Fund*, 561 U.S. at 496-97 (quoting *Clinton*, 520 U.S. at 712-13 (Breyer, J., concurring in judgment)). The President is "the only person who alone composes a branch of government," *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020), and he "occupies a unique office with powers and responsibilities so vast and important that the public interest

demands that he devote his undivided time and attention to his public duties." *Clinton*, 520 U.S. at 697.

B. The Nature of the Act, Not the Manner in Which It is Conducted or Its Alleged Purpose, Determines Whether It Falls Within the Scope of Immunity.

In deciding what conduct falls within the scope of official duties, courts apply an objective test based on the *nature of the act*—not the manner in which it was conducted, or its allegedly malicious purpose. "Immunity is not overcome by 'allegations of bad faith or malice.' Nor is immunity defeated by an allegation that the president acted illegally." *Klayman*, 125 F. Supp. 3d at 86 (citations omitted) (quoting *Barrett v. Harrington*, 130 F.3d 246, 254–55 (6th Cir.1997)).

Fitzgerald emphasized this point, stating as follows: "Because Congress has granted this legislative protection, [Fitzgerald] argues, no federal official could, within the outer perimeter of his duties of office, cause Fitzgerald to be dismissed without satisfying this standard in prescribed statutory proceedings." 457 U.S. at 756. The Supreme Court rejected the argument: "This construction would subject the President to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect." *Id.* Instead, *Fitzgerald* focused on the nature of the act, regardless of whether its manner or purpose was unlawful: "It clearly is within the President's constitutional and statutory authority to prescribe

the manner in which the Secretary will conduct the business of the Air Force. Because this mandate of office must include the authority to prescribe reorganizations and reductions in force, we conclude that petitioner's alleged wrongful acts lay well within the outer perimeter of his authority." *Id.* at 757; *see also Stump v. Sparkman*, 435 U.S. at 362 ("[T]he factors determining whether an act by a judge is a 'judicial' one relate to *the nature of the act itself*, *i.e.*, whether it is a function normally performed by a judge….") (emphasis added); *Tenney*, 341 U.S. at 378.

For the same reasons, alleging that immune acts were part of a conspiracy does not defeat immunity: "[S]ince absolute immunity spares the official any scrutiny of his motives, an allegation that an act was done pursuant to a conspiracy has no greater effect than an allegation that it was done in bad faith or with malice, neither of which defeats a claim of absolute immunity." *Dorman v. Higgins*, 821 F.2d 133, 139 (2d Cir. 1987) (citing cases). In a long series of cases, the Supreme Court has emphasized that the allegedly malicious motive or purpose for the official act is irrelevant to determining its immunity. *See, e.g.*, *Fitzgerald*, 457 U.S. at 745-46; *Fisher*, 80 U.S. at 354 ("The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence."); *Spalding*, 161 U.S. at 494 (holding that immunity

applies even when judges allegedly "act with partiality, or maliciously or corruptly or arbitrarily or oppressively," and that "[t]he allegation of malicious or corrupt motives could always be made, and, if the motives could be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence"); *id.* at 498 ("The motive that impelled him to do that of which the plaintiff complains is therefore wholly immaterial."); *Pierson*, 386 U.S. at 554 ("This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public….'") (quoting *Bradley*, 80 U.S. at 349 n.16); *Barr*, 360 U.S. at 575 (holding that immunity applied "despite the allegations of malice in the complaint").

Judge Learned Hand provided an often-cited analysis of this question:

> The [immunity] decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. *A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine*. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.

Gregoire, 177 F.2d at 581 (Hand, J.) (emphasis added); *see also, e.g., Novoselsky v. Brown*, 822 F.3d 342, 351–52 (7th Cir. 2016) ("An 'unworthy purpose' behind the communication 'does not destroy the privilege,' for immunity would be of little use if it could be defeated by 'a jury's speculation as to motives.'") (quoting *Barr*, 360 U.S. at 575); *In re Global Crossing, Ltd. Sec. Litig*., 314 F. Supp. 2d 172, 174-75 (S.D.N.Y. 2003) ("The 'outer perimeter' of the President's 'official responsibility' would shrink to nothing if a plaintiff, merely by reciting that official acts were part of an unlawful conspiracy, could have them treated by the courts as 'unofficial conduct.'") (citation omitted).

C. Presidential Conduct that Appears Both Official and Personal at Once is Commonplace and Immune from Prosecution.

Because of the unique nature of the Presidency, the President's exercise of his official responsibilities may have personal ramifications, and vice versa. Indeed, as the Supreme Court has recognized, it is commonplace for a President's speech and conduct to have dual roles—both an official and a personal character. "The President is the only person who alone composes a branch of government. As a result, there is not always a clear line between his personal and official affairs." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020). Thus, "for any President the line between official and personal can be both elusive and difficult to discern." *In re Lindsey*, 158 F.3d 1263, 1286 (D.C. Cir. 1998) (Tatel, J., concurring in part and dissenting in part). "Because the Presidency is tied so tightly to the persona of

its occupant, … official matters … often have personal implications for a President." *Id.*

The Biden Administration recently elucidated this point in the D.C. Circuit: "[A] 'first-term President is, in a sense, always a candidate for office,' and it is 'not the least bit unusual for first-term Presidents to comment on public policy or foreign affairs at campaign events, or, in this day, to announce policy changes by tweet during an election year.'" Brief for United States as Amicus Curiae *in Blassingame v. Trump*, Nos. 22-5069, 22-7030, 22-7031 (D.C. Cir. filed March 2, 2023) ("*Blassingame* Amicus Br."), at 13 (citation omitted). "The announcement of a Presidential policy decision at a political rally, or remarks on foreign policy delivered at a campaign event, cannot categorically be excluded from the scope of the President's Office merely because of the context in which they are made." *Id.* at 13-14. "And other statements at such events may be understood by members of the public and domestic and foreign leaders as reflecting the official views of the President, not just the remarks of a political candidate." *Id.* at 14. For this very reason, it is not "appropriate to frame the immunity question … in terms of whether the challenged conduct of the President was undertaken with a purpose 'to secure or perpetuate incumbency.'" *Id.* (citation omitted). "The Supreme Court in *Nixon* emphatically rejected an argument that otherwise-official acts lose immunity if they are motivated by an impermissible purpose. That logic applies with even greater

force to the suggestion that the President should be subject to suit for his official acts whenever those acts are—or are plausibly alleged to have been—motivated by electoral or political considerations." *Id.* at 14-15 (citation omitted).

Thus, although all of President's speech or conduct alleged in the indictment involved official acts, even arguably dual character conduct—*i.e.*, both official and personal—would still lie within the "outer perimeter" of a President's official responsibilities and is immune from prosecution.

D. Every Act Alleged in the Indictment Falls in the Outer Perimeter of the President's Official Duties and is Immune from Criminal Prosecution.

Applying this objective test, every action alleged and attributed to President Trump in the indictment falls within the "outer perimeter" of President Trump's official duties.

1. Making public statements, including Tweets, about matters of national concern is an official action that lies at the heart of presidential duties.

First, making public statements on matters of public concern—especially where they relate to a core federal function such as the administration of a federal election—unquestionably falls within the scope of the President's official duties. "The President of the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf." *Trump v. Hawaii*, 138 S. Ct. 2392, 2417-18 (2018). "[S]peech is unquestionably a critical function of the presidency."

Thompson v. Trump, 590 F. Supp. 3d 46, 79 (D.D.C. 2022). As one scholar of the Presidency has explained, "presidents have a duty constantly to defend themselves publicly, to promote policy initiatives nationwide, and to inspirit the population. And for many, this presidential 'function' is not one duty among many, but rather the heart of the presidency—its essential task." JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY 4 (2017).

In *Barr*, the Supreme Court held that communicating with the public about matters of public interest is standard government practice and well within the scope of official duties:

> The issuance of press releases was standard agency practice, as it has become with many governmental agencies in these times. We think that under these circumstances a publicly expressed statement of the position of the agency head … was an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively. It would be an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty.

Barr, 360 U.S. at 574-75. Even though not necessary or applicable in this instance, notably, immunity applies even if the federal official's public statements are false and "actuated by malice." *Id.* at 568.

This conclusion applies even more strongly to the President. The tradition of Presidents making public statements on matters of national concern arose in the first

days of the Presidency and encompasses historic exercises of presidential duty such as George Washington's Farewell Address and Abraham Lincoln's Gettysburg Address. President Theodore Roosevelt described the Presidency as a "bully pulpit" for advancing policy views on matters of public concern. When a President speaks to the public on matters of public concern—especially issues of uniquely *federal* concern, like federal elections—those statements fall in the heartland of his or her official duties.

As the U.S. Department of Justice recently explained in an amicus brief in the federal D.C. Circuit, the presidential immunity recognized in *Fitzgerald* encompasses the President's "speech to the public on matters of public concern," including "speech … directed toward the constitutional responsibilities of another Branch of government." *Blassingame* Amicus Br. 11. "The traditional 'bully pulpit' of the Presidency … is not limited to speech concerning matters for which the President bears constitutional or statutory responsibility," but includes "matters over which the Executive Branch—or the federal government as a whole—has no direct control." *Id.* at 12. "From the actions of Congress and the Judiciary, to the policies of state and local governments, to the conduct of private corporations and individuals, the President can and must engage with the public on matters of public concern." *Id.* "Such speech is an important traditional function of the Presidency, and it would offend the constitutional separation-of-powers principles recognized in

Nixon [*v. Fitzgerald*] for courts to superintend the President's speech to his constituents and to other officeholders…." *Id.*

The Supreme Court emphasizes that "[a] government entity has the right to speak for itself. It is entitled to say what it wishes, and to select the views that it wants to express." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009) (alterations, citations, and quotation omitted) (citing numerous cases). "[T]he First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely." *Matal v. Tam*, 582 U.S. 218, 234 (2017); *see also, e.g., Lynch v. President of the U.S.*, 2009 WL 2949776, at *1 (N.D. Tex. Sept. 14, 2009) ("Televised publication of the President's views on various topical items is within the outer perimeter of his official duties."). This doctrine applies all the more to the Presidency.

For the same reasons, posting Tweets on matters of public concern that relate to the administration of a federal election falls within the heartland of the President's official duties. A Tweet is a public statement in a different (and more accessible) format. The fact that President Trump often communicated with the public through his Twitter account, in addition to press releases and public speeches, is merely a difference of medium, not of function.[4]

[4] In fact, the Second Circuit recently held that President Trump's Twitter account during his Presidency was a government-run public forum for speech, and that "the factors pointing to the public, non–private nature of the Account and its interactive features are overwhelming." *Knight*

Addressing a different set of allegations, the district court in *Thompson v. Trump* recently concluded that some of President Trump's Tweets and public statements relating to the January 6 certification process did not fall within the outer perimeter of his official duties. *Thompson*, 590 F. Supp. 3d at 79-84. Because *Thompson* was addressing a different set of allegations, it is distinguishable from this case. Regardless, *Thompson*'s analysis is unpersuasive, and President Trump is appealing the decision.[5] First, *Thompson* acknowledged that President Trump's "pre-January 6th Tweets and the January 6 Rally Speech addressed matters of public concern: the outcome of the 2020 Presidential Election and election integrity. Whatever one thinks of the President's views on those subjects, they plainly were matters of public concern." *Id.* at 79. The analysis should have ended there, yet the court went on to analyze whether those Tweets "were spoken in furtherance of a

First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 236 (2d Cir. 2019*), cert. granted, judgment vacated as moot sub nom. Biden v. Knight First Amend. Inst. At Columbia Univ.*, 141 S. Ct. 1220 (2021). The Second Circuit stated that President Trump "has stipulated that he … uses the Account frequently 'to announce, describe, and defend his policies; to promote his Administration's legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; [and] to challenge media organizations whose coverage of his Administration he believes to be unfair.' In June 2017, then–White House Press Secretary Sean Spicer stated at a press conference that President Trump's tweets should be considered 'official statements by the President of the United States.'" *Id.* at 231. The Second Circuit "conclude[d] that the evidence of the official nature of the Account is overwhelming." *Id.* at 234.

[5] Other recent district court decisions coming to similar conclusions in the context of President Trump's claims of civil immunity are largely consistent with *Thompson*. *See Moore v. Trump*, No. 22-CV-00010 (APM), 2022 WL 3904320, at *1 (D.D.C. Aug. 2, 2022); *Michigan Welfare Rts. Org. v. Trump*, No. CV 20-3388 (EGS), 2022 WL 17249218, at *4–5 (D.D.C. Nov. 28, 2022); *United States v. Chrestman*, 525 F. Supp. 3d 14, 33 (D.D.C. 2021). For ease of reference, this memorandum discusses *Thompson*, but its analysis applies to those other decisions as well.

presidential function." *Id.* at 81. But speaking to the public on matters of national concern—especially uniquely federal concerns, like a federal election— is *itself* "a presidential function." *Id.* *Thompson*'s artificially cramped formulation of the President's authority to speak contradicts the much broader historic tradition of presidential communications on all matters that affect the Nation.

Second, *Thompson* misapplied its own "furtherance of a presidential function" test. *Thompson* acknowledged that the investigation and enforcement of fraud in federal elections is a core Executive function. Conceding that "enforcing election laws through litigation strikes at the core of the executive branch's duty to faithfully execute the law," *Thompson* held that "[t]he President can enforce election laws through litigation initiated by the Department of Justice or the Federal Election Commission, agencies over which he has appointment authority." *Id.* at 78. "A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam)). Here, President Trump's alleged Tweets and other public statements about fraud in the election together with the role of the Vice President in the certification of the election were directly related to his contentions that the federal election was tainted by fraud and that the U.S. Department of Justice had failed to adequately investigate and prosecute fraud in the election. By *Thompson*'s

own logic, therefore, his Tweets and public statements were "in furtherance of [the] Presidential function" of assuring adequate enforcement of federal election laws and protecting the integrity of federal elections.

In reaching its conclusion, *Thompson* repeatedly focused on what it deemed the "purpose" of President Trump's public statements. *Id.* at 83. *Thompon* stated that President Trump's Tweets were "*directed at* securing incumbency," that this was "the *purpose* of the January 6 Rally," that "[t]he clear *purpose*" of his public statements was "to help him 'win,'" and that the January 6 speech "reflect[s] an electoral *purpose*…." *Id.* at 82-83 (emphases added). But it is black-letter law that an allegedly improper *purpose,* not present here, for an official act does not rob the act of its official character—indeed, there is hardly an immunity case without such an allegation. "The claim of an unworthy *purpose* does not destroy the privilege." *Tenney*, 341 U.S. at 377 (emphasis added). "The motive that impelled him to do that of which the plaintiff complains is … wholly immaterial." *Spalding*, 161 U.S. at 499. As noted above, the Supreme Court has reaffirmed this principle in a host of cases. *See, e.g., Fitzgerald*, 457 U.S. at 745-46; *Fisher*, 80 U.S. at 350-51; *Pierson*, 386 U.S. at 554; *Barr*, 360 U.S. at 575; *see also Klayman*, 125 F. Supp. 3d at 87.

2. Communicating with the U.S. Department of Justice about investigation of federal election crimes lies at the heart of the President's official duties.

The President's alleged communications with officials at the U.S. Department of Justice about investigating federal election crimes and considering whether to appoint a special counsel to do so, lie at the heart of the President's official duties. Article II provides that the President shall "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. The laws of the United States include prohibitions against election fraud and other election crimes, which the Attorney General of the United States—who is appointed by and reports to the President—is charged with enforcing. *See, e.g.*, 18 U.S.C. §§ 241, 242, 611, 911, 1015(f); 52 U.S.C. §§ 10307(c), 10307(e), 20511(1), 20511(2)(A), 20511(2)(B), 30120, 30124. The Department of Justice publishes a lengthy manual on the prosecution of federal election crimes, U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. 2017), *at* https://www.justice.gov/criminal/file/1029066/download (visited January 8, 2024), which provides that "[f]ederal jurisdiction over election fraud is easily established in elections when a federal candidate is on the ballot." *Id.* at 6. The Department of Justice has an entire "Election Crimes Branch" within the Public Integrity Section that was created in 1980 "to oversee the Justice Department's nationwide response to election crimes." U.S. Dep't of Justice, *Election Crimes Branch*, *at* https://www.justice.gov/criminal-pin/election-crimes-branch (visited

January 8, 2024). The Election Crimes Branch also "consult[s] and support[s] … prosecutors and investigators around the nation." *Id.* It thus communicates with state officials and the public about federal election crimes—exactly what President Trump allegedly urged it to do. It is indisputable that "[t]he President can enforce election laws through litigation initiated by the Department of Justice or the Federal Election Commission, agencies over which he has appointment authority." *Thompson*, 590 F. Supp. 3d at 78. And these are just a few of the federal statutes and executive practices that demonstrate the indisputable federal interest in the integrity and security of state-administered elections—especially elections to *federal* office.

Urging his own Department of Justice to do more to enforce the laws that it is charged with enforcing, and to communicate with state officials and the public about such investigations, is an official act of the President. "[T]he President may undoubtedly, in the performance of his constitutional duty, instruct the Attorney General to give his direct personal attention to legal concerns of the United States elsewhere, when the interests of the Government seem to the President to require this." *Office & Duties of Attorney General*, 6 U.S. Op. Atty. Gen. 326, 335 (1854). "The Attorney General … is the hand of the president in taking care that the laws of the United States in protection of the interests of the United States in legal

proceedings and in the prosecution of offenses be faithfully executed." *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922).

Thus, the President's authority over the Department of Justice, and his directions to the Department to exercise its authority in ways the President favors, are core presidential functions. In *In re Sealed Case*, the D.C. Circuit held that presidential deliberations about replacing the head of the Department of Agriculture constituted a core presidential function: "In this case the documents in question were generated in the course of advising the President in the exercise of his appointment and removal power, a quintessential and nondelegable Presidential power." 121 F.3d 729, 752 (D.C. Cir. 1997). The Court of Appeals noted that "the President himself must directly exercise the presidential power of appointment or removal." *Id.* at 753. So also, the President's deliberations about potentially appointing a special prosecutor to assist in the exercise of these core functions is also a quintessential presidential function.

3. Meeting with state officials about the administration of a federal election lies at the heart of the President's official duties.

Allegedly meeting with state officials about the administration of a federal election in their States and urging them to exercise their official duties with respect to the federal election a certain way, constitute another core exercise of presidential responsibility. The Supreme Court long ago rejected the notion that the President's

Take Care duty is "limited to the enforcement of acts of congress or of treaties of the United States according to their express terms," and held that this duty "include[s] the rights, duties, and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution." *Cunningham v. Neagle*, 135 U.S. 1, 64 (1890). Ensuring the integrity of federal elections and urging state officials to take steps to ensure the fairness and integrity of federal elections fall within "the rights, duties, and obligations growing out of the constitution itself … and all the protection implied by the nature of the government under the constitution." *Id.* *Fitzgerald*, likewise, rejected that notion that the "outer perimeter" of the President's official responsibilities should be identified by parsing specific "functions" of the Presidency, holding that "[i]n many cases it would be difficult to determine which of the President's innumerable 'functions' encompassed a particular action," and that the "functional" approach "could be highly intrusive." 457 U.S. at 756.

Ensuring the integrity of federal elections falls within the President's official responsibilities. "While presidential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States." *Burroughs v. United States*, 290 U.S. 534, 545 (1934); *see also Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983) (discussing the "uniquely important national interest" in presidential

elections). Taking steps to ensure that fraud and other crimes do not vitiate the outcome of a federal election also falls within the President's responsibility. For example, federal election law criminalizes preparing "false ballots, plac[ing] them in the box, and return[ing] them" because that prevents "an honest count ... of the votes lawfully cast." *United States v. Saylor*, 322 U.S. 385, 389 (1944). Communicating with state officials to ensure "an honest count … of the votes lawfully cast" in a federal election, *id.*, thus effectuates federal rights and flows directly from the President's Take Care power, *see Neagle*, 135 U.S. at 59.

Further, the indictment alleges that the President communicated with state officials, arguing that election fraud occurred and urging them to conduct their official duties in a manner to reflect the conclusion that there was election fraud. Those are just the sorts of communications that one would expect the Department of Justice to conduct if it had investigated and concluded that there was election fraud in the relevant States, and therefore well within the President's functions official duties when he carries out those activities on his own. As noted above, the Election Crimes Branch of DOJ "consult[s] and support[s] … prosecutors and investigators around the nation." U.S. Dep't of Justice, *Election Crimes Branch*, *supra*. DOJ's authority is not greater than the President's here; Article II "makes a single President responsible for the actions of the Executive Branch." *Free Enter. Fund*, 561 U.S. at 496-97 (quoting *Clinton*, 520 U.S. at 712-13 (Breyer, J., concurring in judgment)).

The President has the authority to communicate his concerns about alleged fraud in federal elections to the relevant state authorities; this lies in the heartland of presidential authority.

Again, the current Administration has come to the same conclusion—that communicating with state officials about their exercise of official duties with respect to a federal election falls within the scope of the President's official duties: "Such speech is an important traditional function of the Presidency, and it would offend the constitutional separation-of-powers principles recognized in *Nixon* [*v. Fitzgerald*] for courts to superintend the President's speech to his constituents and *to other officeholders* … merely because it concerns the conduct of a coordinate Branch or an entity outside the federal government." *Blassingame* Amicus Br. 12 (citing *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 665 (D.C. Cir. 2006)) (emphasis added).

Thompson came to a different conclusion about the scope of the Take Care responsibility, 590 F. Supp. 3d at 77-78, but its analysis is unpersuasive. *Thompson* reasoned that "a sitting President has no expressly identified duty to faithfully execute the laws surrounding the Certification of the Electoral College." 590 F. Supp. 3d at 78. This conclusion is incorrect for multiple reasons. First, by requiring the President to show an "*expressly* identified duty," *id.* (emphasis added), *Thompson* adopted the very standard that the Supreme Court rejected in *Neagle*, *i.e.*,

that the President's authority is "limited to the enforcement of acts of congress or of treaties of the United States according to their *express* terms." 135 U.S. at 64 (emphasis added). Contrary to *Thompson*, the Supreme Court held that the President's Take Care role "include[s] the rights, duties, and obligations growing out of the constitution itself … and all the protection implied by the nature of the government under the constitution." *Id.* This includes taking steps to prevent the certification of a federal election tainted by fraud—even if those steps are limited to encouraging other state and federal officials to exercise their responsibilities a certain way where the President allegedly has no direct role. *Thompson* likewise violated the Supreme Court's guidance in *Fitzgerald* that the scope of presidential immunity should not be determined by parsing the specific "functions" of the President and demanding that immunity be closely linked to a specific function.

Second, even if the Take Care duty were limited to the "express terms" of federal statutes, which it is not, *Thompson* overlooked the direct connection between the President's duty to enforce federal statutes that safeguard the integrity of federal elections, and his communications with state officials about that very issue. If the President or DOJ concludes that significant fraud occurred in the administration of a federal election, the Take Care Clause does not require them to keep that information to themselves. Rather, it authorizes them to report that conclusion to state (and other federal) officials and to urge them to act accordingly. *Thompson*

concluded that "merely exhorting non-Executive Branch officials to act in a certain way" is not "a responsibility within the scope of the Take Care Clause." 590 F. Supp. 3d at 78. Even if that were so, when "exhorting non-Executive Branch officials to act in a certain way" *effectuates and protects rights conferred by federal statutes*, it plainly falls within the Take Care Clause.

Third, *Thompson*'s conclusion that "[t]he President's Take Care Clause duty … does *not* extend to government officials over whom he has no power or control," *id.* at 78, proves far too much. That formulation entails that the President's urging the Supreme Court to rule a certain way in a case to which the United States is not a party—for example, in an amicus brief filed by the Solicitor General—is a purely private action outside the "outer perimeter" of Executive responsibility, simply because the President has "no power or control" over Article III judges. *Id.* On the contrary, the Take Care duty extends to exhorting other officials to exercise their responsibilities in a manner consistent with the President's view of the public good—*especially* when the issue affects the civil rights of millions of federal voters and addresses an issue of paramount federal concern.

4. Communicating with the President of the Senate and other Members of Congress about the exercise of their official duties regarding federal election certification lies at the heart of the President's official duties.

President Trump's communications with the Vice President in his legislative role as President of the Senate about the exercise of his official duties with respect

to the election certification fall at the heart of the President's official responsibility. Presidents routinely communicate with Congress to provide information and urge them to act, and this conduct is among the most deeply rooted traditions of presidential authority.

The Constitution assigns the President extensive roles in the legislative process, and historically, Presidents are deeply engaged at all stages of the process. Article I, § 7, clause 2 confers on the President the veto power over bills. Clause 3 of the same section confers on the President the veto power over joint resolutions. Article II provides that the President "shall from time to time give to the Congress Information of the State of the Union, and *recommend to their Consideration such Measures as he shall judge necessary and expedient*." U.S. CONST. art. II, § 3 (emphasis added). Article II, § 3 also provides that the President "may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper…." *Id.*

Particularly relevant here, the President's authority to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient," *id.*, encompasses the President's authority to provide information to legislators and urge them to take specific actions:

> It is equally necessary for the executive branch of Government to be able to make its views known to

> Congress on all matters in which it has responsibilities, duties, and opinions. The executive agencies have a definite requirement to express views to Congress, to make suggestions, to request needed legislation, to draft proposed bills or amendments, and so on…. [E]xecutive agencies have the right and responsibility to seek to 'influence, encourage, promote or retard legislation' in many clear and proper—and often extremely effective—respects….

Legislative Activities of Executive Agencies: Hearings Before the H. Select Comm. on Lobbying Activities, 81st Cong., pt. 10, at 2 (1950), *quoted in Lobbying by Executive Branch Personnel*, U.S. Op. O.L.C. Supp. 240, 243-44 (1961), *at* https://www.justice.gov/d9/olc/opinions/1961/10/31/op-olc-supp-v001-p0240_0.pdf (visited January 8, 2024) ("1961 O.L.C. Op."). "[I]n furtherance of basic responsibilities[,] the executive branch and particularly the Chief Executive and his official family of departmental and agency heads" are authorized to "inform and consult with the Congress on legislative considerations, draft bills and urge in messages, speeches, reports, committee testimony and by direct contact the passage or defeat of various measures." H.R. Rep. No. 81-3138, at 52 (quoted in 1961 O.L.C. Op. at 244). The Executive Branch endorsed these statements in 1961: "the participation of the President in the legislative function is based on the Constitution." 1961 O.L.C. Op. at 245. "It was the intention of the Fathers of the Republic that the President should be an active power in legislation .... He is made by the Constitution an important part of the legislative mechanism of our government." *Id.* (square

brackets omitted) (quoting Thomas J. Norton, *The Constitution of the United States: Its Sources and Its Application* 123 (special ed. 1940, 8th printing 1943)).

"The President's right, even duty, to propose detailed legislation to Congress touching every problem of American society, and then to speed its passage down the legislative transmission belt, is now an accepted usage of our constitutional system." *Id.* (quoting Clinton Rossiter, *The American Presidency* 108 (2d rev. ed. 1960)). "This constitutionally established role in the legislative process has become so vital through the years that the President has been aptly termed the Chief Legislator." *Id.* (citing, *inter alia*, Lawrence H. Chamberlain, *The President, Congress and Legislation* 14 (1946)).

Here, the indictment alleges that President Trump urged the Vice President to exercise his authority in the election-certification proceedings to address concerns held be many, including the Commander In Chief as well as numerous congressional officials who spoke out during January 6 proceedings, about the 2020 Presidential election. This conduct lies at the heart of the President's responsibilities in our constitutional tradition, and the question whether the President had a formal role in the election-certification process makes no difference. As the current Administration points out, "a President acts within the scope of his office when he urges Members of Congress to act in a particular way with respect to a given legislative matter—even a matter, such as a congressional investigation, *in which*

the President has no constitutional role." *Blassingame* Amicus Br. 11 (emphasis added).

In fact, there is direct historical precedent for a sitting President communicating with Members of Congress about alleged election fraud relating to the certification of a disputed election involving rival slates of electors. In the wake of the 1876 election, President Grant discussed the electoral count and claims of fraud with a member of the U.S. House. See 28 THE PAPERS OF ULYSSES S. GRANT 80–81 (ed. John Y. Simon 2005), *at* https://scholarsjunction.msstate.edu/usg-volumes/27/ (visited January 8, 2024). Likewise, President Grant transmitted to Congress a letter he received from an observer (a U.S. Senator) whom he had requested to go to New Orleans and witness the counting of votes. *Id.* at 75-78. President Grant also dispatched federal troops to Louisiana and Florida to prevent violence while Republican-controlled election boards counted votes, and he instructed the federal troops to report fraud in the election. *See id.* at 19-20. These were Presidential acts.

5. Allegedly requesting another person to organize contingent slates of electors falls within the President's official duties.

The indictment alleges that President Trump requested another individual to assist in organizing contingent slates of electors in disputed States. *Id.* at 30 ("Act 44") (alleging that President Trump placed a phone call to the RNC Chairwoman to request her assistance in organizing contingent slates of electors); *see also id.* at 32

("Act 51"); *id.* at 57 ("Act 123"); *id.* at 61 ("Act 129"); *id.* ("Act 131"); *id.* at 61 ("Act 132").

These actions fall within the President's official responsibilities for at least two reasons. First, as noted above, the "outer perimeter" of the President's official responsibilities "include[s] the rights, duties, and obligations growing out of the constitution itself … and all the protection implied by the nature of the government under the constitution." *Neagle*, 135 U.S. at 64. The Constitution explicitly provides for presidential electors and delineates their role. U.S. CONST. art. II, §1, cl. 2. "While presidential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States." *Burroughs*, 290 U.S. at 545.

To, allegedly, discuss organizing slates of electors in an effort to protect the integrity of a federal election, therefore, relates directly to "the rights, duties, and obligations growing out of the constitution itself," *Neagle*, 135 U.S. at 64, and thus to the President's responsibilities. Without contingent slates of electors, there would be no alternative option for the Vice President to certify, rendering the President's actions of urging Congress not to certify the fraud-tainted results futile. The organization of the slates of electors, therefore, relates closely to two presidential functions—protecting the integrity of federal elections, and urging Members of Congress to act in a manner consistent with the President's view of the public good.

These actions clearly lie within the "outer perimeter" of the President's "official responsibilities." *Fitzgerald*, 457 U.S. at 756. At the time of the alleged conduct, the Electoral Count Act did not prohibit organizing contingent slates of electors, and such electors had been organized previously in the disputed elections of 1876 and 1960—including, in the former case, with the support of the sitting President. Therefore, this was was not a situation where "the President takes measures incompatible with the express or implied will of Congress," but a situation where the President was acting in an area of "independent presidential responsibility." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Second, as the indictment itself emphasizes, the actions of organizing slates of electors were ancillary and preparatory to the acts of communicating with the Vice President and other Members of Congress and urging them to exercise their official responsibilities a certain way—which are themselves core exercises of presidential responsibility. Acts that are part and parcel of immune actions—including preparatory actions—are themselves immune from liability. For example, it is widely accepted that "[a]bsolute prosecutorial immunity will … attach to administrative or investigative acts necessary for a prosecutor to initiate or maintain the criminal prosecution." *Prince v. Hicks*, 198 F.3d 607, 612 (6th Cir. 1999) (quoting *Ireland v. Tunis*, 113 F.3d 1435, 1447 (6th Cir. 1997)); *see also, e.g.*, *Guzman–Rivera v. Rivera–Cruz*, 55 F.3d 26, 29 (1st Cir. 1995) ("[A]bsolute immunity may attach even to ... administrative or investigative activities when these functions are necessary so that a prosecutor may fulfill his function as an officer of

the court.") (quoting *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1490 (10th Cir. 1991)). "[T]he Supreme Court has recognized that some duties prior to the initiation of a prosecution are also protected. Preparing to initiate a prosecution may necessitate obtaining, reviewing and evaluating evidence; absolute immunity may attach when these functions are necessary so that a prosecutor may fulfill his function as an officer of the court." *Snell v. Tunnell*, 920 F.2d 673, 693 (10th Cir. 1990) (citing *Imbler*, 424 U.S. at 431 n.33). Thus, a prosecutor "who performs functions within the continuum of initiating and presenting a criminal case … ordinarily will be entitled to absolute immunity." *Id.* So also here. The President's alleged act regarding the contingent slates of electors "perform[ed] within the continuum" of his other immune acts, such as protecting the integrity of federal elections and communicating with Congress about the federal election, are also immune.

6. Alleging that President Trump's presidential acts were part of a criminal conspiracy or enterprise does not strip them of immunity.

The indictment alleges that President Trump's official actions were supposedly part of a criminal conspiracy or enterprise. *See* Indictment, at 14 (alleging that "Trump … knowingly and willfully joined a conspiracy to unlawfully change the outcome of the election in favor of Trump"); *id.* at 15 (alleging that President Trump was part of an "enterprise" through his "connections and relationships with one another and with the enterprise"). These allegations of a

supposed "conspiracy" and "enterprise" do not change President Trump's immunity. "[S]ince absolute immunity spares the official any scrutiny of his motives, an allegation that an act was done pursuant to a conspiracy has no greater effect than an allegation that it was done in bad faith or with malice, neither of which defeats a claim of absolute immunity." *Dorman v. Higgins*, 821 F.2d 133, 139 (2d Cir. 1987); *see also, e.g., Dennis v. Sparks*, 449 U.S. 24, 27 (1980) (noting that, in a case where a state judge was alleged to have conspired with private individuals to issue a corrupt injunction, "the judge has been properly dismissed from the suit on the immunity grounds"). "[A]llegations that a conspiracy produced a certain decision should no more pierce the actor's immunity than allegations of bad faith, personal interest or outright malevolence." *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (en banc). "To foreclose immunity upon allegations that judicial and prosecutorial decisions were conditioned upon a conspiracy … serves to defeat these policies." *Id.* "It is a well-established rule that where a judge's absolute immunity would protect him from liability for the performance of particular acts, mere allegations that he performed those acts pursuant to a … conspiracy will not be sufficient to avoid the immunity." *Holloway v. Walker*, 765 F.2d 517, 522 (5th Cir. 1985).

II. PRESIDENT TRUMP'S PROSECUTION IS BARRED BY SUPREMACY CLAUSE IMMUNITY

For the reasons set forth *supra*, the prosecution here is also prohibited by the U.S. Constitution's Supremacy Clause. U.S. Const. art. VI, cl. 2. The Supremacy Clause provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

The President of the United States "occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). The Constitution vests the "executive Power" in the President, *id*. (quoting U.S. Const. art. II, § 1), and entrusts him with commander- in-chief, foreign-affairs, supervisory, and policy duties "of utmost discretion and sensitivity." *Id*. at 750. The President is "the only person who alone composes a branch of government." *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020); *see also Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2203 (2020). "The Supremacy Clause prohibits state judges and prosecutors from interfering with a President's official duties." *Vance*, 140 S. Ct. at 2428 (citations omitted).

Because the Executive Branch and its powers are created solely by Article II of the U.S. Constitution, any state authority to regulate the conduct of the President "had to be delegated to, rather than reserved by, the States." *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 805 (1995) (emphasis added) (quoting 1 Story § 627). "'*[T]he states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them....* No state can say, that it has reserved, what it never possessed.'" *Id.* at 805.

The Supreme Court has held that states cannot use their criminal law to interfere with actions that are inseparably connected to the functioning of the national government. There can be no doubt that the election of the President of the United States is so connected to the function of the national government. The seminal case on this general Supremacy Clause bar of state criminalization in federal governmental matters is *In re Loney*, 134 U.S. 372, 376 (1890). There, a regular citizen – not a federal officer – was charged with perjury under Virginia state law for testimony that he gave in a contest that Congress was adjudicating as to which of two candidates for Congress it was going to seat from a certain district in Virginia. The Supreme Court held that the State of Virginia had no jurisdiction or authority to charge Loney under state criminal law because he was testifying pursuant to federal law about a matter exclusively within the purview of Congress and, therefore, of the federal government. In so holding, the Court noted that the state governments cannot

be allowed to interfere in or impede these federal government processes because they may be motivated by the preferences of "a disappointed suitor or contestant" or "instigated by local passion or prejudice." *Id.* at 375. The Court, therefore, barred the state's criminal prosecution of Loney on Supremacy Clause grounds.

For the same reasons expressed by the Supreme Court in *Loney* and its progeny, the State has no authority to involve itself – through criminalization – in the exercise of presidential authority under Article II of the U.S. Constitution. *See also In re Waite*, 81 F. 359, 372 (N.D. Iowa 1897) (state criminal laws not applicable to a pension examiner appointed under the laws of the United States for acts done in connection with his duties as examiner); *State of Ohio v. Thomas*, 173 U.S. 276, 283 (1899) (holding that state had no authority to apply its criminal laws to the director of a national soldiers' home in Ohio because he was acting on federal authority and *"[u]nder such circumstances the police power of the state has no application."*); *cf. In re Neagle*, 135 U.S. at 99 (federal officer responsible for protecting federal judge who killed a man in the line of duty was released pretrial from state charges because he was acting under the authority of the law of the United States and, therefore, not liable to answer in the courts of California for criminal charges).

CONCLUSION

President Trump's prosecution for alleged acts during his term in office is barred by presidential and Supremacy Clause immunity. Accordingly, this motion

to dismiss should be granted and all counts in the indictment should be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify I electronically filed the foregoing document with the Clerk of Court using Odyssey Efile Georgia electronic filing system that will send notification of such filing to all parties of record.

This 8th day of January, 2024.

/s/ Steven H. Sadow
STEVEN H. SADOW