No. 23-939

In the
Supreme Court of the United States

DONALD J. TRUMP,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 9, 2024 Decided February 6, 2024

No. 23-3228

UNITED STATES OF AMERICA,

APPELLEE

v.

DONALD J. TRUMP,

APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:23-cr-00257-1)

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Gene C. Schaerr and *Justin A. Miller* were on the brief for *amici curiae* Former Attorney General Edwin Meese III and Law Professors Steven G. Calabresi and Gary S. Lawson in support of neither party.

Before: HENDERSON, CHILDS and PAN, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

PER CURIAM: Donald J. Trump was elected the 45th President of the United States on November 8, 2016. He was sworn into office at noon on January 20, 2017, and served until his term expired at noon on January 20, 2021. At that moment, President Trump became former President Trump and his successor, Joseph R. Biden, became President and began his own four-year term. U.S. CONST. art. II, § 1. Although this sequence is set by the Constitution, *id.* amend. XX, it did not proceed peacefully. Indeed, from election day 2020 forward, the government alleges that President Trump denied that he had lost his bid for a second term and challenged the election results through litigation, pressure on state and federal officers, the organization of an alternate slate of electors and other

means. His alleged interference in the constitutionally prescribed sequence culminated with a Washington, D.C., rally held on January 6, 2021, the day set by the Electoral Count Act, 3 U.S.C. § 15(a), for the Congress to meet in joint session to certify the election results. The rally headlined by President Trump resulted in a march of thousands to the Capitol and the violent breach of the Capitol Building. The breach delayed the congressional proceedings for several hours and it was not until the early morning of January 7th that the 2020 presidential election results were certified, naming Joseph R. Biden as the soon-to-be 46th President.

Since then, hundreds of people who breached the Capitol on January 6, 2021, have been prosecuted and imprisoned. And on August 1, 2023, in Washington, D.C., former President Trump was charged in a four-count Indictment as a result of his actions challenging the election results and interfering with the sequence set forth in the Constitution for the transfer of power from one President to the next. Former President Trump moved to dismiss the Indictment and the district court denied his motion. Today, we affirm the denial. For the purpose of this criminal case, former President Trump has become citizen Trump, with all of the defenses of any other criminal defendant. But any executive immunity that may have protected him while he served as President no longer protects him against this prosecution.

I. BACKGROUND

Former President Trump did not concede the 2020 election and, in the ensuing months, he and his supporters made numerous attempts to challenge the results. Many of their attempts were allegedly

criminal.[1] A District of Columbia federal grand jury indicted former President Trump on four criminal counts arising from the steps he allegedly took to change the outcome of the election: (1) conspiracy to defraud the United States by overturning the election results, in violation of 18 U.S.C. § 371; (2) conspiracy to obstruct an official proceeding — *i.e.*, the Congress's certification of the electoral vote — in violation of 18 U.S.C. § 1512(k); (3) obstruction of, and attempt to obstruct, the certification of the electoral vote, in violation of 18 U.S.C. §§ 1512(c)(2), 2; and (4) conspiracy against the rights of one or more persons to vote and to have their votes counted, in violation of 18 U.S.C. § 241. At this stage of the prosecution, we assume that the allegations set forth in the Indictment are true. *United States v. Ballestas*, 795 F.3d 138, 149 (D.C. Cir. 2015). We emphasize that whether the Indictment's allegations are supported by evidence sufficient to sustain convictions must be determined at a later stage of the prosecution.

The Indictment alleges that former President Trump understood that he had lost the election and that the election results were legitimate but that he nevertheless was "determined to remain in power." Indictment ¶ 2. He then conspired with others to cast doubt on the election's outcome and contrived to have himself declared the winner. The Indictment charges that he and his co-conspirators allegedly advanced their goal through five primary means:

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[1] Former President Trump's campaign and his supporters also unsuccessfully challenged the election results in several state and federal courts.

First, they "used knowingly false claims of election fraud" to attempt to persuade state legislators and election officials to change each state's electoral votes in former President Trump's favor. Indictment ¶ 10(a). For example, he and his allies falsely declared "that more than ten thousand dead voters had voted in Georgia"; "that there had been 205,000 more votes than voters in Pennsylvania"; "that more than 30,000 non-citizens had voted in Arizona"; and "that voting machines . . . had switched votes from [Trump] to Biden." *Id.* at ¶ 12.

Second, then-President Trump and his co-conspirators "organized fraudulent slates of electors in seven targeted states . . . attempting to mimic the procedures that the legitimate electors were supposed to follow." Indictment ¶ 10(b). They "then caused these fraudulent electors to transmit their false certificates to the Vice President and other government officials to be counted at the certification proceeding on January 6." *Id.*

Third, then-President Trump and his co-conspirators pressed officials at the Department of Justice "to conduct sham election crime investigations and to send a letter to the targeted states that falsely claimed that the Justice Department had identified significant concerns that may have impacted the election outcome." Indictment ¶ 10(c).

Fourth, then-President Trump and his co-conspirators attempted to convince then-Vice President Mike Pence to "use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." Indictment ¶ 10(d). When the Vice President rebuffed them, he stirred his base of supporters to increase pressure on the Vice President. *See id.* at ¶¶ 10(d), 96, 100. Ultimately, on

the morning of January 6, 2021, he held a rally in Washington D.C. where he "repeated knowingly false claims of election fraud to gathered supporters" and "directed them to the Capitol to obstruct the certification proceeding and exert pressure on the Vice President to take the fraudulent actions he had previously refused." *Id.* at ¶¶ 10(d), 90(c).

Fifth, and finally, from the January 6 rally, thousands of his supporters — "including individuals who had traveled to Washington and to the Capitol at [his] direction" — swarmed the United States Capitol, causing "violence and chaos" that required the Congress to temporarily halt the election-certification proceeding. Indictment ¶¶ 107, 119, 121. At that point, he and his co-conspirators "exploited the disruption by redoubling efforts to levy false claims of election fraud and convince Members of Congress to further delay the certification." *Id.* at ¶ 10(e).

Then-President Trump's efforts to overturn the election results were unsuccessful and the Congress certified the Electoral College vote in favor of President-Elect Biden. Indictment ¶ 123. On January 11, 2021, nine days before President-Elect Biden's inauguration, the House of Representatives adopted an impeachment resolution charging then-President Trump with "Incitement of Insurrection." H.R. Res. 24, 117th Cong. (2021). The single article of impeachment alleged that he had violated "his constitutional oath faithfully to execute the office of President of the United States . . . [and] his constitutional duty to take care that the laws be faithfully executed . . . by inciting violence against the Government of the United States." *Id.* at 2. The impeachment resolution asserted that "President Trump repeatedly issued false statements asserting

that the Presidential election results were the product of widespread fraud and should not be accepted by the American people or certified by State or Federal officials," *id.* at 2–3; that his statements on the morning of January 6 "encouraged — and foreseeably resulted in — lawless action at the Capitol," *id.* at 3; and that he attempted to "subvert and obstruct the certification of the results of the 2020 Presidential election" by other means, including by threatening a Georgia state official into manipulating the results, *id.* at 3–4.

Importantly, by the time the United States Senate conducted a trial on the article of impeachment, he had become former President Trump. At the close of the trial, on February 13, 2021, fifty-seven Senators voted to convict him and forty-three voted to acquit him. *See* 167 CONG. REC. S733 (daily ed. Feb. 13, 2021). Because two-thirds of the Senate did not vote for conviction, he was acquitted on the article of impeachment. *See id.*; U.S. CONST. art. I, § 3, cl. 6.

On November 18, 2022, the U.S. Attorney General appointed John L. Smith as Special Counsel to investigate "efforts to interfere with the lawful transition of power following the 2020 presidential election or the certification of the Electoral College vote."[2] A Washington, D.C., grand jury returned the instant four-count Indictment against former President Trump on August 1, 2023, and on August 28, 2023, the district court set a trial date of March 4, 2024.

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[2] Off. of the Att'y Gen., "Appointment of John L. Smith as Special Counsel," Order No. 5559-2022 (Nov. 18, 2022).

Former President Trump filed four motions to dismiss the Indictment, relying on: (1) presidential immunity; (2) constitutional provisions, including the Impeachment Judgment Clause and principles stemming from the Double Jeopardy Clause; (3) statutory grounds; and (4) allegations of selective and vindictive prosecution.

On December 1, 2023, the district court issued a written opinion denying the two motions that are based on presidential immunity and the two constitutional provisions. In relevant part, the district court rejected Trump's claim of executive immunity from criminal prosecution, holding that "[f]ormer Presidents enjoy no special conditions on their federal criminal liability." *United States v. Trump*, --- F. Supp. 3d ---, 2023 WL 8359833, at *3 (D.D.C. Dec. 1, 2023). It concluded that "[t]he Constitution's text, structure, and history do not support" the existence of such an immunity, *id.*, and that it "would betray the public interest" to grant a former President "a categorical exemption from criminal liability" for allegedly "attempting to usurp the reins of government." *Id.* at *12. It also held that "neither traditional double jeopardy principles nor the Impeachment Judgment Clause provide that a prosecution following impeachment acquittal violates double jeopardy." *Id.* at *18.[3]

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[3] Former President Trump does not challenge the district court's other holdings at this stage: (1) that "the First Amendment does not protect speech that is used as an instrument of a crime, and consequently the indictment — which charges [Trump] with, among other things, making statements in furtherance of a crime — does not violate [Trump]'s First Amendment rights," *Trump*, --- F. Supp. 3d ---, 2023 WL 8359833, at *15, and (2) that the Indictment does not violate Due

Former President Trump filed an interlocutory appeal of the district court's presidential immunity and double-jeopardy holdings. On December 13, 2023, we granted the government's motion to expedite the appeal, and oral argument was held on January 9, 2024.

II. JURISDICTION

Although both parties agree that the Court has jurisdiction over former President Trump's appeal, *amicus curiae* American Oversight raises a threshold question about our collateral-order jurisdiction. In every case, "we must assure ourselves of our jurisdiction." *In re Brewer*, 863 F.3d 861, 868 (D.C. Cir. 2017). Under 28 U.S.C. § 1291, which grants us jurisdiction over "final decisions of the district courts," *id.*, "we ordinarily do not have jurisdiction to hear a defendant's appeal in a criminal case prior to conviction and sentencing," *United States v. Andrews*, 146 F.3d 933, 936 (D.C. Cir. 1998). The collateral-order doctrine, however, treats as final and thus allows us to exercise appellate jurisdiction over "a small class of [interlocutory] decisions that conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and are effectively unreviewable on appeal from a final judgment." *Citizens for Resp. & Ethics in Wash. v. Dep't of Homeland Sec.*, 532 F.3d 860, 864 (D.C. Cir. 2008) (cleaned up). The district court's denial of former President Trump's immunity defense unquestionably satisfies the first two requirements and thus we focus our analysis on the

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Process because Trump "had fair notice that his conduct might be unlawful," *id.* at *22.

third: whether the denial of immunity is effectively unreviewable on appeal from a final judgment.

District court orders rejecting claims of *civil* immunity are quintessential examples of collateral orders. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 741–43 (1982) (executive immunity from civil liability); *Blassingame v. Trump*, 87 F.4th 1, 12 (D.C. Cir. 2023) (same). But in *Midland Asphalt Corp. v. United States*, the Supreme Court counseled that the collateral-order doctrine is interpreted "with the utmost strictness in criminal cases." 489 U.S. 794, 799 (1989) (cleaned up).

The *Midland Asphalt* Court emphasized that criminal collateral orders that are based on "[a] right not to be tried" must "rest[] upon an *explicit* statutory or constitutional guarantee that trial will not occur" — singling out the Double Jeopardy Clause and the Speech or Debate Clause. 489 U.S. at 801 (emphasis added). Former President Trump does not raise a straightforward claim under the Double Jeopardy Clause but instead relies on the Impeachment Judgment Clause and what he calls "double jeopardy principles." Appellant's Br. 54 n.7. The double-jeopardy "principle[]" he relies on is a negative implication drawn from the Impeachment Judgment Clause. *See id.* at 8, 12, 46–47. Thus, he does not invoke our jurisdiction based on the explicit grant of immunity found in the Double Jeopardy Clause.

Nevertheless, we can exercise jurisdiction for two reasons. First, *Midland Asphalt* is distinguishable and does not *require* immunity to derive from an explicit textual source. Second, the theories of immunity former President Trump asserts are sufficient to satisfy *Midland Asphalt* under Circuit precedent.

A. DISTINGUISHING *MIDLAND ASPHALT*

Midland Asphalt dealt with the third prong of the collateral-order test in the context of criminal defendants who argued they were entitled to immediately appeal the denial of their motion to dismiss an indictment because the government had violated Federal Rule of Criminal Procedure 6(e)(2)'s requirement of grand jury secrecy. 489 U.S. at 796. The Supreme Court held that an order is "effectively unreviewable" on appeal "only where the order at issue involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'" *Id.* at 799 (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978)). The Court rejected the defendants' argument that the denial of the motion satisfied the third prong. It explained that "[i]t is true that deprivation of the right not to be tried satisfies the *Coopers & Lybrand* requirement of being 'effectively unreviewable on appeal from a final judgment,'" but held that the defendants had not asserted a right against trial in "the sense relevant for purposes of the exception to the final judgment rule." *Id.* at 801–02 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) ("To come within the [collateral-order doctrine], the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.")).

The reason the defendants' argument failed, the *Midland Asphalt* Court held, was that it overlooked the "crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges." 489 U.S. at 801 (quotation omitted). "A right not to be tried in the sense relevant to the [collateral-

order doctrine] rests upon an explicit statutory or constitutional guarantee that trial will not occur — as in the Double Jeopardy Clause . . . or the Speech or Debate Clause." *Id.* By contrast, Rule 6(e)(2) did not "give[] rise to a right not to stand trial" but instead merely created a right to secret grand jury proceedings, the violation of which could be remedied through the indictment's dismissal. *Id.* at 802.

American Oversight's argument hinges on the Court's use of the adjective "explicit" — a word that appears only once in the *Midland Asphalt* opinion. The Court has repeatedly (and recently) cautioned against "read[ing] too much into too little," reminding us that "'[t]he language of an opinion is not always to be parsed as though we were dealing with language of a statute.'" *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 373 (2023) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)). Instead, opinions "must be read with a careful eye to context" and the "particular work" that quoted language performs within an opinion. *Id.* at 374; *see also Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1968 (2021) (Gorsuch, J., concurring in part) ("[T]his Court [has] often said it is a mistake to parse terms in a judicial opinion with the kind of punctilious exactitude due statutory language.").

The Supreme Court itself has hinted, although not squarely held, that *Midland Asphalt*'s language should not be read literally. In *Digital Equipment*, the Court quoted the relevant sentence from *Midland Asphalt* and characterized it as a "suggest[ion]." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 874 (1994) ("Only such an 'explicit statutory or constitutional guarantee that trial will not occur,' we suggested, could be grounds for an immediate appeal

of right under § 1291." (internal citation to *Midland Asphalt*, 489 U.S. at 801, omitted)). The Court then weighed the argument that *Midland Asphalt*'s comment is dictum because the Court allows interlocutory review of other implied immunities, including qualified immunity. *Id.* at 875 (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)). The Court did not concede the point, however, as it pointed out that *Midland Asphalt* is a criminal case and *Mitchell* is a civil case, but it allowed that "even if *Mitchell* could not be squared fully with the literal words of the *Midland Asphalt* sentence . . . that would be only because the qualified immunity right is inexplicit, not because it lacks a good pedigree in public law." *Id.* It then noted "the insight that explicitness may not be needed for jurisdiction consistent with § 1291."[4] *Id.* The Court ultimately chose to reject the petitioner's argument on a different basis, *see id.* at 877, so it did not squarely resolve how to interpret *Midland Asphalt*. But a fair reading contemplates that there are exceptions to *Midland Asphalt*'s broad statement. *See id.* at 875. Other courts have held to that effect. *See Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 217 n.9 (4th Cir. 2012) (en banc) (reading *Digital Equipment* to hold that qualified immunity's "good pedigree in public law . . . more than makes up for its implicitness" (cleaned up)); *McClendon v. City of Albuquerque*, 630 F.3d 1288, 1296 n.2 (10th Cir. 2011) (interpreting *Digital Equipment*'s "good pedigree in public law" comment as a "binding" reconciliation of

[4] Elsewhere, *Digital Equipment* refers to rights "originating in the Constitution or statutes." 511 U.S. at 879. Its broader formulation comfortably encompasses implicit as well as explicit immunities.

Midland Asphalt with the immediate appealability of some implicit immunities).

There is good reason not to read *Midland Asphalt* literally here. Read in context, the Court's use of "explicit" was simply to contrast a right against trial and a right that entitles the defendant to the dismissal of charges. The latter can be vindicated through appeal after a final judgment, but the former cannot. The Court was not addressing an issue as to which it was necessary to distinguish between explicit and implied rights against trial; instead, it addressed the defendants' assertion that the violation of the Federal Rules of Criminal Procedure entitled them to immediate review. *See Midland Asphalt*, 489 U.S. at 802 (Rule 6(e) contained "no hint" of a right against trial). Thus, "explicit" did not perform any "particular work" within the opinion, *see Nat'l Pork Producers*, 598 U.S. at 374, meaning it would be a mistake to make a doctrinal mountain out of a verbal molehill. *See Al Shimari*, 679 F.3d at 246 (Wilkinson, J., dissenting) (calling *Midland Asphalt*'s sentence "dictum" and a "lonely line").

Nor was the question presented in *Midland Asphalt* anything like the one before us. Procedural rules are worlds different from a former President's asserted immunity from federal criminal liability. The Supreme Court has repeatedly emphasized that the President is *sui generis*. In the civil context, the Court has held that the denial of the President's assertion of absolute immunity is immediately appealable "[i]n light of the special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers." *Fitzgerald*, 457 U.S. at 743. And in *United States v. Nixon*, the Court waived the typical requirement that

the President risk contempt before appealing because it would be "unseemly" to require the President to do so "merely to trigger the procedural mechanism for review of the ruling." 418 U.S. 683, 691–92 (1974). It would be equally "unseemly" for us to require that former President Trump first be tried in order to secure review of his immunity claim after final judgment. When the Court instructs us to read its opinions "with a careful eye to context," *see Nat'l Pork Producers*, 598 U.S. at 374, it authorizes us to consider the "special solicitude" due a former President, *Fitzgerald*, 457 U.S. at 743.

One final reason not to overread a single adjective in *Midland Asphalt* is that there is no apparent reason to treat an *implicit* constitutional immunity from trial differently from an *explicit* one for interlocutory review.[5] *Midland Asphalt* certainly did not provide one. The ultimate source of our appellate jurisdiction is 28 U.S.C. § 1291, which extends to the "final decision[]" of the district court. There is no basis in the statutory text to treat the denial of an explicit immunity as final but the denial of an implicit immunity as non-final. In both cases, the "deprivation of the right not to be tried" would be "effectively

[5] By contrast, the Supreme Court has explained why a right against trial must ordinarily be "statutory or constitutional" in nature to fall within the collateral-order doctrine. *Midland Asphalt*, 489 U.S. at 801. Whether a right can be effectively reviewed after final judgment "simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Digital Equip.*, 511 U.S. at 878–79. But there is no need for courts to make that judgment call "[w]hen a policy is embodied in a constitutional or statutory provision," thus leaving "little room for the judiciary to gainsay its importance." *Id.* at 879 (cleaned up).

unreviewable on appeal from a final judgment." *Midland Asphalt*, 489 U.S. at 800–01 (quotation omitted). Whether explicit or implicit in the Constitution, the right not to stand trial must be "vindicated before trial" or not at all. *Id.* at 799 (quotation omitted).

B. CIRCUIT PRECEDENT

Our Circuit precedent has taken a broad view of *Midland Asphalt*, consistently holding that the denial of a right not to stand trial is immediately appealable if the right is similar or analogous to one provided in the Constitution. Both of former President Trump's asserted sources of immunity — separation of powers and double jeopardy principles — fit within this window of appealability. *See* Appellant's Br. 2–3 (listing "Statement of the Issues").

Our caselaw includes *United States v. Rose*, a civil case in which we held that Congressman Rose's standalone separation of powers immunity was reviewable under § 1291 because it served the same function as a claim of Speech or Debate Clause immunity. 28 F.3d 181 (D.C. Cir. 1994). Congressman Rose argued that he had immunity from the DOJ's suit against him because "the action was barred by the Speech or Debate Clause" and, separately, because "the separation of powers doctrine barred the DOJ from suing him" when a congressional committee had already investigated him. *Id.* at 185. We held that the latter claim falls within the collateral-order doctrine, "recogniz[ing] claims of immunity based on the separation of powers doctrine as an additional exception to the general rule against interlocutory appeals." *Id.* Granted, we acknowledged that the separation of powers doctrine "does not provide as precise a protection as the Speech or Debate Clause,"

but we focused on the "equivalent reasons for vindicating in advance of trial whatever protection it affords." *Id.* at 186 (quotation omitted).

We confirmed *Rose*'s applicability in the criminal context in *United States v. Durenberger*, 48 F.3d 1239 (D.C. Cir. 1995). There, former Senator Durenberger sought to dismiss an indictment, arguing based on separation of powers that the district court was powerless to decide whether he had violated the Senate's rules, a prerequisite of its assessment of the criminal charges against him. *See id.* at 1241; U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . ."). He thus "claim[ed] that, as a former member of the Senate, he cannot be held to answer criminal charges when his liability depends on judicial usurpation of the Senate's exclusive right to formulate its internal rules." *Durenberger*, 48 F.3d at 1242. We held that this "colorable" argument was sufficient to confer appellate jurisdiction under *Rose*. *Id.* Notably, the constitutional text invoked in *Durenberger* can hardly be said to create an "explicit" right not to stand trial. As we explained in a subsequent case, both *Rose* and *Durenberger* rest on the rationale that the "separation-of-powers doctrine conferred . . . an analogous and comparable privilege" to the Speech or Debate Clause. *United States v. Cisneros*, 169 F.3d 763, 770 (D.C. Cir. 1999).

Following the Supreme Court's lead, *see Abney v. United States*, 431 U.S. 651, 662 (1977) (denial of motion to dismiss indictment on double jeopardy grounds is immediately appealable), we have also allowed interlocutory review by analogizing to the explicit constitutional immunity in the Double Jeopardy Clause. In *United States v. Trabelsi*, we

exercised interlocutory appellate jurisdiction of the defendant's invocation of a treaty's *non bis in idem* provision, which "mirror[ed] the Constitution's prohibition of double jeopardy." 28 F.4th 1291, 1298 (D.C. Cir. 2022), *cert. denied*, 143 S. Ct. 345 (2022). The treaty provision's similarity to the constitutional guarantee, we held, was enough to bring the appeal within the scope of *Abney*.

Former President Trump's two arguments can be analogized to explicit constitutional immunities, which is all that *Durenberger* and *Trabelsi* require. His separation of powers argument does not explicitly draw on the Speech or Debate Clause but neither did the argument in *Durenberger*. The immunity for official acts former President Trump asserts is "closely akin to a claim of Speech or Debate Clause immunity," *Cisneros*, 169 F.3d at 770, making it immediately appealable because "there are equivalent reasons for vindicating [it] in advance of trial," *Rose*, 28 F.3d at 186 (quotation omitted). Likewise, the defense argues that the Impeachment Judgment Clause "incorporates a Double Jeopardy principle." Appellant's Br. 46. We found a similar line of reasoning convincing in *Trabelsi*. If a treaty provision that "mirrors" the Double Jeopardy Clause falls within the collateral-order doctrine, so does a constitutional clause that (purportedly) attaches jeopardy to a Senate's impeachment acquittal. Both of former President Trump's arguments are at least analogous enough to the Speech or Debate Clause or the Double Jeopardy Clause to fit within our precedent.

Nor will exercising jurisdiction here put us in conflict with other circuits, as American Oversight suggests. *See* Am. Oversight Br. 9. The chief cases on

which American Oversight relies are readily distinguishable because in each the asserted right against trial was not grounded solely in either the Constitution or a statute. *See United States v. Joseph*, 26 F.4th 528, 534 (1st Cir. 2022) (a state judge's immunity depended "solely on the common law"); *United States v. Macchia*, 41 F.3d 35, 38 (2d Cir. 1994) (addressing "an alleged agreement with the United States Attorney" to provide the defendant with immunity); *United States v. Wampler*, 624 F.3d 1330, 1337 & n.3 (10th Cir. 2010) (involving "an executory plea agreement between a company and the government" that excluded the defendants).

Accordingly, we conclude that we have jurisdiction to reach the merits of former President Trump's appeal.

III. EXECUTIVE IMMUNITY

For all immunity doctrines, "the burden is on the official claiming immunity to demonstrate his entitlement." *Dennis v. Sparks*, 449 U.S. 24, 29 (1980). Former President Trump claims absolute immunity from criminal prosecution for all "official acts" undertaken as President, a category, he contends, that includes all of the conduct alleged in the Indictment.

The question of whether a former President enjoys absolute immunity from federal criminal liability is one of first impression. *See Blassingame*, 87 F.4th at 5 (noting the unresolved question of "whether or when a President might be immune from criminal prosecution"). The Supreme Court has consistently held that even a sitting President is not immune from responding to criminal subpoenas issued by state and federal prosecutors. *See Trump v. Vance*, 140 S. Ct.

2412, 2431 (2020); *Nixon*, 418 U.S. at 706; *United States v. Burr*, 25 F. Cas. 30, 33–34 (C.C. Va. 1807) (Marshall, C.J.). In the civil context, the Supreme Court has explained that a former President is absolutely immune from civil liability for his official acts, defined to include any conduct falling within the "'outer perimeter' of his official responsibility." *Fitzgerald*, 457 U.S. at 756. Both sitting and former Presidents remain civilly liable for private conduct. *Clinton v. Jones*, 520 U.S. 681, 686, 694–95 (1997); *Blassingame*, 87 F.4th at 12–14. When considering the issue of Presidential immunity, the Supreme Court has been careful to note that its holdings on civil liability do not carry over to criminal prosecutions. *See Fitzgerald*, 457 U.S. at 754 n.37 (explaining the "lesser public interest in actions for civil damages than, for example, in criminal prosecutions"); *cf. Clinton*, 520 U.S. at 704 n.39 (noting special considerations at issue in criminal cases).

Former President Trump's claimed immunity would have us extend the framework for Presidential civil immunity to criminal cases and decide for the first time that a former President is categorically immune from federal criminal prosecution for any act conceivably within the outer perimeter of his executive responsibility. He advances three grounds for establishing this expansive immunity for former Presidents: (1) Article III courts lack the power to review the President's official acts under the separation of powers doctrine; (2) functional policy considerations rooted in the separation of powers require immunity to avoid intruding on Executive Branch functions; and (3) the Impeachment Judgment Clause does not permit the criminal prosecution of a

former President in the absence of the Congress impeaching and convicting him.

Our analysis is "guided by the Constitution, federal statutes, and history," as well as "concerns of public policy." *Fitzgerald*, 457 U.S. at 747. Relying on these sources, we reject all three potential bases for immunity both as a categorical defense to federal criminal prosecutions of former Presidents and as applied to this case in particular.

A. SEPARATION OF POWERS DOCTRINE

The President of the United States "occupies a unique position in the constitutional scheme." *Fitzgerald*, 457 U.S. at 749; *see Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020) ("The President is the only person who alone composes a branch of government."). Under the separation of powers established in the Constitution, the President is vested with "executive Power," U.S. CONST. art. II, § 1, cl.1, which entails the duty to "take Care that the Laws be faithfully executed," *id.* § 3, and "supervisory and policy responsibilities of utmost discretion and sensitivity," *Fitzgerald*, 457 U.S. at 750. The President's constitutional role exists alongside the Congress's duty to make the laws, U.S. CONST. art. I, § 1, and the Judiciary's duty to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

"It is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." *Fitzgerald*, 457 U.S. at 753–54; *see also Nixon*, 418 U.S. at 706 (separation of powers doctrine cannot "sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all

circumstances"). Nevertheless, former President Trump argues that the constitutional structure of separated powers means that "neither a federal nor a state prosecutor, nor a state or federal court, may sit in judgment over a President's official acts, which are vested in the Presidency alone." Appellant's Br. 10. He relies on *Marbury*'s oft-quoted statement that a President's official acts "can never be examinable by the courts." *Id.* (quoting *Marbury*, 5 U.S. (1 Cranch) at 166); *see also* Reply Br. 6.

Former President Trump misreads *Marbury* and its progeny. Properly understood, the separation of powers doctrine may immunize lawful discretionary acts but does not bar the federal criminal prosecution of a former President for *every* official act.

Marbury distinguished between two kinds of official acts: discretionary and ministerial. As to the first category, Chief Justice Marshall recognized that "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." *Marbury*, 5 U.S. (1 Cranch) at 165–66. When the President or his appointed officers exercise discretionary authority, "[t]he subjects are political" and "the decision of the executive is conclusive." *Id.* at 166. Their discretionary acts, therefore, "can never be examinable by the courts." *Id.* "But," Chief Justice Marshall continued, "when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer *of the law*; is *amenable to the laws for his conduct*; and cannot at his discretion sport away the vested rights

of others." *Id.* (emphases added). Under these circumstances, an executive officer acts as a "ministerial officer . . . compellable to do his duty, and if he refuses, is liable to indictment." *Id.* at 150; *see id.* at 149–50 ("It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer having public duties to perform, should be above the compulsion of law in the exercise of those duties."). Based on these principles, Chief Justice Marshall concluded that, although discretionary acts are "only politically examinable," the judiciary has the power to hear cases "where a specific duty is assigned by law." *Id.* at 166. *Marbury* thus makes clear that Article III courts may review certain kinds of official acts — including those that are legal in nature.

The cases following *Marbury* confirm that we may review the President's actions when he is bound by law, including by federal criminal statutes. In *Little v. Barreme*, the Supreme Court concluded that the President's order to a subordinate officer to seize American ships traveling to or from French ports violated the Nonintercourse Act precisely because the Congress had acted to constrain the Executive's discretion. 6 U.S. (2 Cranch) 170, 177–79 (1804). Chief Justice Marshall observed that the President may have had the discretionary authority to order the seizure absent legislation but had no discretion to violate the Act. *Id.* at 177–78. Similarly, in *Kendall v. United States ex rel. Stokes*, the Supreme Court reviewed the official acts of the postmaster general, the President's subordinate officer who derived his authority from the Executive Branch, because the civil case involved the violation of a statutory requirement. 37 U.S. 524, 612–13 (1838). To find a

statutory violation unreviewable, the Court held, "would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice." *Id.* at 613.

Then, in *Mississippi v. Johnson*, the Supreme Court considered whether the State of Mississippi could sue President Andrew Johnson to enjoin him from enforcing the Reconstruction Acts, which the State alleged were unconstitutional. 71 U.S. 475, 497–98 (1866). The Court concluded that it lacked jurisdiction to issue an injunction, relying on *Marbury*, *Kendall* and the distinction between "mere ministerial dut[ies]" in which "nothing was left to discretion" and "purely executive and political" duties involving the President's discretion. *Id.* at 498–99; *see also Martin v. Mott*, 25 U.S. 19, 31–32 (1827) (no judicial power to review President exercising his "discretionary power" conferred by statute). In holding that it could not enjoin the President from using his discretion, the Court nevertheless affirmed the role of the Judiciary in checking the other two branches of government: "The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." *Mississippi*, 71 U.S. at 500.

The Supreme Court exercised its cognizance over Presidential action to dramatic effect in 1952, when it held that President Harry Truman's executive order seizing control of most of the country's steel mills exceeded his constitutional and statutory authority and was therefore invalid. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–89 (1952). The

Congress had not legislated to authorize President Truman's seizure and in fact had "refused to adopt th[e seizure] method of settling labor disputes." *Id.* at 586. President Truman could lawfully act only to execute the Congress's laws or to carry out his constitutional duties as the Executive; and he lacked authority from either source to seize the steel mills. *Id.* at 587–89. As Justice Jackson explained, the Court's holding invalidating the executive order was proper because "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Id.* at 637 (Jackson, J., concurring). Based on *Youngstown* and *Marbury*, the Supreme Court in *Clinton* easily concluded that "when the President takes official action, the Court has the authority to determine whether he has acted within the law." *Clinton*, 520 U.S. at 703.

Objection may be made that *Marbury* and its progeny exercised jurisdiction only over subordinate officers, not the President himself. The writ in *Marbury* was brought against the Secretary of State; in *Little* against a commander of a ship of war; in *Kendall* against the postmaster general; in *Youngstown* against the Secretary of Commerce. But as the Supreme Court has unequivocally explained:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that

> supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

United States v. Lee, 106 U.S. 196, 220 (1882). "That principle applies, of course, to a President." *Vance*, 140 S. Ct. at 2432 (Kavanaugh, J., concurring).

Further, the Supreme Court has repeatedly affirmed the judiciary's power to "direct appropriate process to the President himself." *Clinton*, 520 U.S. at 705. The President does not enjoy absolute immunity from criminal subpoenas issued by state and federal prosecutors and may be compelled by the courts to respond. *Burr*, 25 F. Cas. at 33–34; *Nixon*, 418 U.S. at 713–14; *Vance*, 140 S. Ct. at 2431. We have "200 years of precedent establishing that Presidents, and their official communications, are subject to judicial process, even when the President is under investigation." *Vance*, 140 S. Ct. at 2427 (citations omitted); *see also Clinton*, 520 U.S. at 703–05 (recounting history of sitting Presidents complying with court orders to provide testimony and other evidence).

The separation of powers doctrine, as expounded in *Marbury* and its progeny, necessarily permits the Judiciary to oversee the federal criminal prosecution of a former President for his official acts because the fact of the prosecution means that the former President has allegedly acted in defiance of the Congress's laws. Although certain discretionary actions may be insulated from judicial review, the structure of the Constitution mandates that the President is "amenable to the laws for his conduct" and "cannot at his discretion" violate them. *Marbury*, 5 U.S. (1 Cranch) at 166. Here, former President Trump's actions allegedly violated generally

applicable criminal laws, meaning those acts were not properly within the scope of his lawful discretion; accordingly, *Marbury* and its progeny provide him no structural immunity from the charges in the Indictment.

Our conclusion that the separation of powers doctrine does not immunize former Presidents from federal criminal liability is reinforced by the analogous immunity doctrines for legislators and judges. Legislators and judges are absolutely immune from civil suits for any official conduct, and legislators have an explicit constitutional immunity from criminal prosecution arising from the Speech or Debate Clause. Nevertheless, legislators and judges can be criminally prosecuted under generally applicable laws for their official acts consistent with the separation of powers doctrine.

Legislators have explicit constitutional immunity from criminal or civil liability "for what they do or say in legislative proceedings" under the Speech or Debate Clause. *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951); *see* U.S. CONST. art. I, § 6, cl. 1. But outside of constitutionally protected legislative conduct, members of the Congress perform a wide range of "acts in their official capacity" that are not "legislative in nature" and so can subject them to criminal liability. *Gravel v. United States*, 408 U.S. 606, 625 (1972); *see id.* at 626 (Speech or Debate Clause "does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts"). In *United States v. Johnson*, a Congressman was criminally charged with conspiring to pressure the Department of Justice to dismiss pending indictments of a loan company and its officers on mail fraud charges. 383 U.S. 169, 171

(1966). The Supreme Court held that the prosecution could not include evidence related to a speech made by Johnson on the House floor because of his constitutional immunity but, the Court made clear, Johnson could be retried on the same count "wholly purged of elements offensive to the Speech or Debate Clause." *Id.* at 185. Although his unprotected conduct constituted an official act under *Fitzgerald* (communicating with the Executive Branch), *see id.* at 172, it was constrained by and subject to "criminal statute[s] of general application." *Id.* at 185.

Judges are similarly liable to the criminal laws for their official acts. A notable example is *Ex parte Commonwealth of Virginia*, in which the Supreme Court applied *Marbury*'s discretionary/ministerial distinction to affirm the criminal indictment of a judge based on an official act. 100 U.S. 339 (1879). A county judge was indicted in federal court for violating a federal statute that prohibited discriminating on the basis of race in jury selection. *Id.* at 340, 344. The Supreme Court began by observing the principle that officers are bound to follow the law: "We do not perceive how holding an office under a State, and claiming to act for the State, can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience." *Id.* at 348. The Court then addressed the judge's argument that the Court lacked the authority to punish a state judge for "his official acts." *Id.* Its response was twofold. First, the Court described juror selection as "merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads." *Id.* The Court then

explained that even if juror selection is considered a "judicial act," the judge had a legal duty to obey the criminal laws:

> But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the State statute? That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a circuit court, to exclude all colored men merely because they were colored. *Such an exclusion was not left within the limits of his discretion.* It is idle, therefore, to say that the act of Congress is unconstitutional because it inflicts penalties upon State judges for their judicial action. It does no such thing.

Id. at 348–49 (emphasis added).[6]

More recent case law on the judicial immunity doctrine affirms that judges are not immune from criminal liability for their official acts. *O'Shea v. Littleton* confirmed the holding of *Ex parte Virginia* in dismissing a civil rights action for equitable relief brought against a county magistrate and associate judge of a county circuit. 414 U.S. 488, 490–91, 503 (1974). The Supreme Court concluded that the requested injunction was not the only available remedy because both judges remained answerable to the federal criminal laws:

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[6] The Court's reference to "the State statute" is to the Virginia law charging the county judge with the duty to select jurors in the circuit and county courts. *Ex parte Virginia*, 100 U.S. at 340.

> [W]e have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivation of constitutional rights. On the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress . . . .'

Id. at 503 (citation to *Ex parte Virginia*, 100 U.S. 339, omitted; quoting *Gravel*, 408 U.S. at 627). Similarly, in *Dennis v. Sparks*, the Court affirmed judicial immunity from civil money damages in the context of bribery allegations but explained that judges "are subject to criminal prosecutions as are other citizens." 449 U.S. at 31. Crucially, the judge in *Dennis* retained civil immunity because "the challenged conduct" — allegedly issuing an injunction corruptly after accepting bribes as part of a conspiracy — was "an official judicial act within his statutory jurisdiction, broadly construed." *Id.* at 29. The scope of civil judicial immunity thus aligns with civil Presidential immunity under *Fitzgerald*, but a judge has no criminal immunity for the same "official act." *See also Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) ("Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights . . . ."); *United States v. Gillock*, 445 U.S. 360, 372 (1980) ("[T]he cases in this Court which have recognized an immunity from civil suit for state officials have

presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials.").[7]

When considering the criminal prosecutions of judges, other circuits have repeatedly rejected judicial criminal immunity for official acts, largely in the context of bribery prosecutions. *See United States v. Claiborne*, 727 F.2d 842, 845 (9th Cir.) (per curiam), *cert. denied*, 469 U.S. 829 (1984); *United States v. Hastings*, 681 F.2d 706, 709–11 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983); *United States v. Isaacs*, 493 F.2d 1124, 1143–44 (7th Cir.) (per curiam), *cert. denied*, 417 U.S. 976 (1974), *overruled on other grounds by United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987). Former President Trump argues that bribery allegations were not considered "judicial acts" at common law, Appellant's Br. 21, but his sources do not support his conclusion. He is correct that Blackstone and other early common law sources expressly contemplated the criminal prosecution of judges on bribery charges. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *139; *Perrin v. United*

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[7] In his brief, former President Trump contends otherwise, primarily relying on two words in a single line of dictum from *Spalding v. Vilas* to urge that judges are immune from criminal prosecution for their official acts. Appellant's Br. 19. *Spalding* was a civil case in which the Supreme Court quoted an opinion of the Supreme Court of New York: "The doctrine which holds a judge exempt from a civil suit *or indictment* for any act done or omitted to be done by him, sitting as judge, has a deep root in the common law." *Spalding v. Vilas*, 161 U.S. 483, 494 (1896) (quoting *Yates v. Lansing*, 5 Johns. 282, 291 (N.Y. Sup. Ct. 1810)) (emphasis added). The Supreme Court did not analyze the scope of judicial criminal immunity itself and the quoted New York language is flatly incompatible with the Supreme Court case law addressed *supra*. We do not consider *Spalding*'s dictum binding on the question of judicial criminal immunity.

States, 444 U.S. 37, 43 (1979). But this shows only that judicial immunity did not stretch to shield judges from generally applicable criminal laws, not that bribery was ever considered a nonofficial act. And as explained *supra*, the Supreme Court emphasized the official nature of the bribery allegations in *Dennis* while reinforcing the judge's criminal liability.

We therefore conclude that Article III courts may hear the charges alleged in the Indictment under the separation of powers doctrine, as explained in *Marbury* and its progeny and applied in the analogous contexts of legislative and judicial immunity. The Indictment charges that former President Trump violated criminal laws of general applicability. Acting against laws enacted by the Congress, he exercised power that was at its "lowest ebb." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Former President Trump lacked any lawful discretionary authority to defy federal criminal law and he is answerable in court for his conduct.

B. FUNCTIONAL POLICY CONSIDERATIONS

Even though it is proper under *Marbury* and its progeny for an Article III court to hear criminal charges brought against a former President, we "necessarily" must "weigh[] concerns of public policy, especially as illuminated by our history and the structure of our government," including our "constitutional heritage and structure." *Fitzgerald*, 457 U.S. at 747–48; *see id.* at 748 (our historical analysis merges with public policy analysis "[b]ecause the Presidency did not exist through most of the development of common law"); *Clinton*, 520 U.S. at 694 (courts apply "a functional approach" in determining the scope of official immunity). "This inquiry involves 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. Our analysis entails "balanc[ing] the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." *Id.* at 754.

We note at the outset that our analysis is specific to the case before us, in which a former President has been indicted on federal criminal charges arising from his alleged conspiracy to overturn federal election results and unlawfully overstay his Presidential term.[8] We consider the policy concerns at issue in this case in two respects. First, we assess possible intrusions on the authority and functions of the Executive Branch and the countervailing interests to be served as those concerns apply to former President Trump's claim that former Presidents are categorically immune from federal prosecution. We conclude that the interest in criminal accountability, held by both the public and the Executive Branch, outweighs the potential risks of chilling Presidential action and permitting vexatious litigation. Second, we examine the additional interests raised by the nature of the charges in the Indictment: The Executive Branch's interest in upholding Presidential elections and vesting power in a new President under the Constitution and the voters' interest in democratically selecting their President. We find these interests

[8] We do not address policy considerations implicated in the prosecution of a sitting President or in a state prosecution of a President, sitting or former.

compel the conclusion that former President Trump is not immune from prosecution under the Indictment.

1. CATEGORICAL IMMUNITY DEFENSE

Former President Trump argues that criminal liability for former Presidents risks chilling Presidential action while in office and opening the floodgates to meritless and harassing prosecution. These risks do not overcome "the public interest in fair and accurate judicial proceedings," which "is at its height in the criminal setting." *Vance*, 140 S. Ct. at 2424.

Former President Trump first asserts that the prospect of potential post-Presidency criminal liability would inhibit a sitting President's ability to act "fearlessly and impartially," citing the "especially sensitive duties" of the President and the need for "bold and unhesitating action." Appellant's Br. 21–22 (quoting *Fitzgerald*, 457 U.S. at 745–46). But "[t]he chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice." *Clark v. United States*, 289 U.S. 1, 16 (1933). In *Clark*, the Supreme Court dismissed the threat of a chilling effect, holding that jurors could be subject to criminal prosecution for conduct during their jury service and explaining that a "juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice." *Id.* Rather, the Court observed, "[h]e will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor." *Id.* The Court reinforced the point in *United States v. Nixon*, holding that it could not "conclude that [Presidential] advisers

will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." 418 U.S. at 712. So too here. We cannot presume that a President will be unduly cowed by the prospect of post-Presidency criminal liability any more than a juror would be influenced by the prospect of post-deliberation criminal liability, or an executive aide would be quieted by the prospect of the disclosure of communications in a criminal prosecution.

Moreover, past Presidents have understood themselves to be subject to impeachment and criminal liability, at least under certain circumstances, so the possibility of chilling executive action is already in effect. Even former President Trump concedes that criminal prosecution of a former President is expressly authorized by the Impeachment Judgment Clause after impeachment and conviction. *E.g.*, Oral Arg. Tr. 13:25–14:9. We presume that every President is aware of the Impeachment Judgment Clause and knows that he is "liable and subject to Indictment, Trial, Judgment and Punishment, according to Law," at least after impeachment and conviction. U.S. CONST. art. I, § 3, cl. 7.

Additionally, recent historical evidence suggests that former Presidents, including President Trump, have not believed themselves to be wholly immune from criminal liability for official acts during their Presidency. President Gerald Ford issued a full pardon to former President Richard Nixon, which both former Presidents evidently believed was necessary to avoid Nixon's post-resignation indictment. *See, e.g.*, *President Gerald R. Ford's Proclamation 4311, Granting a Pardon to Richard Nixon*, Ford

Presidential Library (Sept. 8, 1974); *Statement by Former President Richard Nixon* 1, Ford Presidential Library (Sept. 8, 1974). Before leaving office, President Bill Clinton agreed to a five-year suspension of his law license and a $25,000 fine in exchange for Independent Counsel Robert Ray's agreement not to file criminal charges against him. *See* John F. Harris & Bill Miller, *In a Deal, Clinton Avoids Indictment*, WASH. POST (Jan. 20, 2001), https://perma.cc/MMR9-GDTL. And during President Trump's 2021 impeachment proceedings for incitement of insurrection, his counsel argued that instead of post-Presidency impeachment, the appropriate vehicle for "investigation, prosecution, and punishment" is "the article III courts," as "[w]e have a judicial process" and "an investigative process . . . to which no former officeholder is immune." 167 CONG. REC. S607 (daily ed. Feb. 9, 2021); *see also id.* at S693 (daily ed. Feb. 12, 2021) ("[T]he text of the Constitution . . . makes very clear that a former President is subject to criminal sanction after his Presidency for any illegal acts he commits."). In light of the express mention of "Indictment" in the Impeachment Judgment Clause and recent historical evidence of former Presidents acting on the apparent understanding that they are subject to prosecution even in the absence of conviction by the Senate, the risk of criminal liability chilling Presidential action appears to be low.

Instead of inhibiting the President's lawful discretionary action, the prospect of federal criminal liability might serve as a structural benefit to deter possible abuses of power and criminal behavior. "Where an official could be expected to know that certain conduct would violate statutory or

constitutional rights, he should be made to hesitate . . . .” *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). As the district court observed: “Every President will face difficult decisions; whether to intentionally commit a federal crime should not be one of them.” *Trump*, --- F. Supp. 3d ---, 2023 WL 8359833, at *9.

Former President Trump next urges that a lack of criminal immunity will subject future Presidents to politically motivated prosecutions as soon as they leave office. In the civil context, the Supreme Court found official-act Presidential immunity necessary in part to avoid “subject[ing] the President to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose.” *Fitzgerald*, 457 U.S. at 756; *see id.* at 753 (“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 suits for civil damages.”). But the decision to initiate a federal prosecution is committed to the prosecutorial discretion of the Executive Branch. Prosecutors have ethical obligations not to initiate unfounded prosecutions and “courts presume that they . . . properly discharge[] their official duties.” *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)). There are additional safeguards in place to prevent baseless indictments, including the right to be charged by a grand jury upon a finding of probable cause. U.S. CONST. amend. V; *Kaley v. United States*, 571 U.S. 320, 328 (2014). “[G]rand juries are prohibited from engaging in ‘arbitrary fishing expeditions’ and initiating investigations ‘out of malice or an intent to harass.’” *Vance*, 140 S. Ct. at 2428 (quoting *United States v. R. Enters., Inc.*, 498 U.S. 292, 299 (1991)).

Additionally, former President Trump's "predictive judgment" of a torrent of politically motivated prosecutions "finds little support in either history or the relatively narrow compass of the issues raised in this particular case," *see Clinton*, 520 U.S. at 702, as former President Trump acknowledges that this is the first time since the Founding that a former President has been federally indicted. Weighing these factors, we conclude that the risk that former Presidents will be unduly harassed by meritless federal criminal prosecutions appears slight.

On the other side of the scale, we must consider "the constitutional weight of the interest to be served" by allowing the prosecution of a former President to proceed. *Fitzgerald*, 457 U.S. at 754. The public has a fundamental interest in the enforcement of criminal laws. *Vance*, 140 S. Ct. at 2424. "[O]ur historic commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that 'the twofold aim (of criminal justice) is that guilt shall not escape or innocence suffer.'" *Nixon*, 418 U.S. at 708–09 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). As the *Nixon* Court explained, wholly immunizing the President from the criminal justice process would disturb "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions" to such an extent that it would undermine the separation of powers by "plainly conflict[ing] with the function of the courts under Art. III." *Nixon*, 418 U.S. at 707.

There is also a profound Article II interest in the enforcement of federal criminal laws. The President has a constitutionally mandated duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. As part of this duty, the President is

responsible for investigating and prosecuting criminal violations. *See Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function."); *see also In re Lindsey*, 158 F.3d 1263, 1272 (D.C. Cir. 1998) ("Investigation and prosecution of federal crimes is one of the most important and essential functions within [the President's] constitutional responsibility."); *Cmty. For Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) ("The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws . . . ."). Beyond simply making explicit that a President must enforce the law, the Take Care Clause plays a central role in "signify[ing] . . . the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules." *Youngstown*, 343 U.S. at 646 (Jackson, J., concurring). It would be a striking paradox if the President, who alone is vested with the constitutional duty to "take Care that the Laws be faithfully executed," were the sole officer capable of defying those laws with impunity.

The federal prosecution of a former President fits the case "[w]hen judicial action is needed to serve broad public interests" in order to "vindicate the public interest in an ongoing criminal prosecution." *Fitzgerald*, 457 U.S. at 754. The risks of chilling Presidential action or permitting meritless, harassing prosecutions are unlikely, unsupported by history and "too remote and shadowy to shape the course of justice." *See Clark*, 289 U.S. at 16. We therefore conclude that functional policy considerations rooted

in the structure of our government do not immunize former Presidents from federal criminal prosecution.

2. IMMUNITY FROM THE INDICTMENT'S CHARGES

In addition to the generally applicable concerns discussed *supra*, the allegations of the Indictment implicate the Article II interests in vesting authority in a new President and the citizenry's interest in democratically selecting its President.

The Indictment alleges that the assertedly "official" actions at issue here were undertaken by former President Trump in furtherance of a conspiracy to unlawfully overstay his term as President and to displace his duly elected successor. *See* Indictment ¶¶ 2, 10. That alleged conduct violated the constitutionally established design for determining the results of the Presidential election as well as the Electoral Count Act of 1887, neither of which establishes a role for the President in counting and certifying the Electoral College votes. U.S. CONST. art. II, § 1, cl. 3; *id.* amend. XII; 3 U.S.C. § 15, *amended by* 136 Stat. 4459, 5238 (2022); *see* Indictment ¶¶ 9–10. The alleged conduct also violated Article II's mandate that a President "hold his Office during the Term of four Years." U.S. CONST. art. II, § 1, cl. 1. The Twentieth Amendment reinforces the discrete nature of a presidential term, explicitly providing that "[t]he terms of the President and Vice President shall end at noon on the 20th day of January . . .; and the terms of their successors shall then begin." U.S. CONST. amend. XX, § 1. Upon "the expiration of the time for which he is elected," a former president "returns to the mass of the people again" and the power of the Executive Branch vests in the newly elected President. *Burr*, 25 F. Cas. at 34;

U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in *a* President of the United States of America.") (emphasis added).

The President, of course, also has a duty under the Take Care Clause to faithfully enforce the laws. This duty encompasses following the legal procedures for determining election results and ensuring that executive power vests in the new President at the constitutionally appointed time. To the extent former President Trump maintains that the post-2020 election litigation that his campaign and supporters unsuccessfully pursued implemented his Take Care duty, he is in error. *See infra* n.14. Former President Trump's alleged conduct conflicts with his constitutional mandate to enforce the laws governing the process of electing the new President.

The public has a strong interest in the foundational principle of our government that the will of the people, as expressed in the Electoral College vote, determines who will serve as President. *See* U.S. CONST. amend. XII ("The Electors shall meet in their respective states, and vote by ballot for President and Vice-President. . . . The person having the greatest number of votes for President, shall be the President."); *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020) ("Early in our history, States decided to tie electors to the presidential choices of [citizens]."). The Supreme Court recently noted that "the Framers made the President the most democratic and politically accountable official in Government," the only one who (along with the Vice President) is "elected by the entire Nation." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020). "To justify and check" the President's "unique [authority] in our constitutional structure," Article II

"render[s] the President directly accountable to the people through regular elections." *Id.* As James Madison put it, "[a] dependence on the people is, no doubt, the primary control on the government." The Federalist No. 51, at 253 (James Madison) (Coventry House Publishing, 2015)[9]; *see also Morrison*, 487 U.S. at 731 (Scalia, J., dissenting) ("[T]he Founders . . . established a single Chief Executive accountable to the people" so that "the blame [could] be assigned to someone who can be punished."). Thus, the quadrennial Presidential election is a crucial check on executive power because a President who adopts unpopular policies or violates the law can be voted out of office.

Former President Trump's alleged efforts to remain in power despite losing the 2020 election were, if proven, an unprecedented assault on the structure of our government. He allegedly injected himself into a process in which the President has no role — the counting and certifying of the Electoral College votes — thereby undermining constitutionally established procedures and the will of the Congress. To immunize former President Trump's actions would "further . . . aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress." *Youngstown*, 343 U.S. at 654 (Jackson, J., concurring) (footnote omitted). As Justice Jackson warned:

> Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the

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[9] Federalist No. 51 is "generally attributed to Madison" but is "sometimes attributed to 'Hamilton or Madison.'" *INS v. Chadha*, 462 U.S. 919, 950 (1983).

> focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.

Id. at 653–54 (Jackson, J., concurring).

We cannot accept former President Trump's claim that a President has unbounded authority to commit crimes that would neutralize the most fundamental check on executive power — the recognition and implementation of election results. Nor can we sanction his apparent contention that the Executive has carte blanche to violate the rights of individual citizens to vote and to have their votes count.

* * *

At bottom, former President Trump's stance would collapse our system of separated powers by placing the President beyond the reach of all three Branches. Presidential immunity against federal indictment would mean that, as to the President, the Congress could not legislate, the Executive could not prosecute and the Judiciary could not review. We cannot accept that the office of the Presidency places its former occupants above the law for all time thereafter. Careful evaluation of these concerns leads us to conclude that there is no functional justification for immunizing former Presidents from federal prosecution in general or for immunizing former

President Trump from the specific charges in the Indictment. In so holding, we act, "not in derogation of the separation of powers, but to maintain their proper balance." *See Fitzgerald*, 457 U.S. at 754.

C. THE IMPEACHMENT JUDGMENT CLAUSE

The strongest evidence against former President Trump's claim of immunity is found in the words of the Constitution. The Impeachment Judgment Clause provides that "[j]udgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: 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. That language limits the consequences of impeachment to removal and disqualification from office, but explicitly preserves the option of criminal prosecution of an impeached official "according to Law."

Former President Trump agrees that the Impeachment Judgment Clause contemplates and permits the prosecution of a former President on criminal charges — he argues only that such a former President first must be impeached by the House and "convicted" by the Senate. Appellant's Br. 12–14, 31. In other words, he asserts that, under the Clause, a former President enjoys immunity for any criminal acts committed while in office *unless* he is first impeached and convicted by the Congress. Under that theory, he claims that he is immune from prosecution because he was impeached and *acquitted*. By taking that position, former President Trump potentially narrows the parties' dispute to whether he may face criminal charges in this case consistent with the

Impeachment Judgment Clause: If the Clause requires an impeachment conviction first, he may not be prosecuted; but if it contains no such requirement, the Clause presents no impediment to his prosecution.

Former President Trump also implicitly concedes that there is no absolute bar to prosecuting assertedly "official" actions. He argues elsewhere in his brief that his impeachment on the charge of inciting insurrection was based on conduct that was the "same and closely related" to the "official acts" charged in the Indictment. Appellant's Br. 46 ("President Trump was impeached and acquitted by the Senate for the same and closely related conduct to that alleged in the indictment." (emphasis omitted)); *id.* at 42 ("[A]ll five types of conduct alleged in the indictment constitute official acts."). And he agrees that if he had been convicted by the Senate in that impeachment trial, he would not be immune from prosecution for the "official acts" at issue here. *See id.* at 31. Thus, he concedes that a President can be prosecuted for broadly defined "official acts," such as the ones alleged in the Indictment, under some circumstances, *i.e.*, following an impeachment conviction.

The Impeachment Judgment Clause is focused solely on those who are convicted by the Senate following impeachment by the House. The first part of the Clause limits the penalties that can be imposed based on an impeachment conviction: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States." U.S. CONST. art. I, § 3, cl. 7. The second part makes clear that the limited consequences of impeachment do not immunize convicted officers from criminal prosecution: "[T]he

Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." *Id.*

In former President Trump's view, however, the word "convicted" in the second phrase implicitly bestows immunity on Presidents who are *not* convicted, based on a negative implication. He asserts that the Impeachment Judgment Clause "presupposes" that a President is not criminally liable absent a conviction in the Senate. Appellant's Br. 12. Other courts have rejected this "tortured" interpretation of the Impeachment Judgment Clause, which previously has been advanced to support claims of judicial immunity. *See Claiborne*, 727 F.2d at 846 ("According to Claiborne, this language means that a federal judge cannot be indicted and tried in an Article III court unless he has been removed from office by the impeachment process. Both *Isaacs* and *Hastings* rejected this tortured interpretation . . . ." (cleaned up)); *Hastings*, 681 F.2d at 710; *Isaacs*, 493 F.2d at 1142 (The Impeachment Judgment Clause "does not mean that a judge may not be indicted and tried without impeachment first."). Moreover, former President Trump's interpretation runs counter to the text, structure and purpose of the Impeachment Judgment Clause. *See N.L.R.B. v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017) ("The force of any negative implication . . . depends on context," and "applies only when circumstances support a sensible inference that the term left out must have been meant to be excluded." (cleaned up)); *Mercy Hosp., Inc. v. Azar*, 891 F.3d 1062, 1069 (D.C. Cir. 2018) ("Finding the negative implication of a statute is a context-specific exercise.").

To begin, former President Trump's reliance on a negative implication is an immediate red flag: The Framers knew how to explicitly grant criminal immunity in the Constitution, as they did to legislators in the Speech or Debate Clause. *See* U.S. CONST. art. I, § 6, cl. 1. Yet they chose not to include a similar provision granting immunity to the President. *See Vance*, 140 S. Ct. at 2434 (Thomas, J., dissenting) ("The text of the Constitution explicitly addresses the privileges of some federal officials, but it does not afford the President absolute immunity."). The Impeachment Judgment Clause merely states that "the Party convicted" shall nevertheless be subject to criminal prosecution. The text says nothing about non-convicted officials. Former President Trump's reading rests on a logical fallacy: Stating that "if the President is convicted, he can be prosecuted," does not necessarily mean that "if the President is *not* convicted, he *cannot* be prosecuted." *See, e.g.*, *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 589 (2014) (Scalia, J., concurring) (explaining "the fallacy of the inverse (otherwise known as denying the antecedent): the incorrect assumption that if P implies Q, then not-P implies not-Q").

Another important clue is the Clause's use of the word "nevertheless," as in "the Party convicted shall *nevertheless* be liable." U.S. CONST. art. I, § 3, cl. 7 (emphasis added). The meaning of "neverthele'ss," according to a contemporaneous 18th century dictionary, is "[n]otwithsta'nding that," which in turn means "[w]ithout hindrance or obstruction from." 2 Samuel Johnson, A Dictionary of the English Language 200, 216 (1773). The Impeachment Judgment Clause contains no words that limit criminal liability — and, to the contrary, it uses

"nevertheless" to ensure that liability will *not* be limited (*i.e.*, "hindered or obstructed"), even after an official is impeached, convicted and removed from office.

The text of the Impeachment Judgment Clause reflects its purpose: To allocate responsibility between the Legislative and Executive branches for holding impeached officers accountable for misconduct. In 18th-century Great Britain, impeachment could result in "capital punishment . . . fine and ransom[,] or imprisonment." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 782; *see also Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He was Impeached by the House and Acquitted by the Senate*, 24 Op. O.L.C. 110, 120 (2000) (hereinafter, "OLC Double Jeopardy Memo") (noting that impeachment in Britain could have resulted "in a wide array of criminal penalties, including fines, imprisonment, and even execution"). The Framers chose to withhold such broad power from the Senate, specifying instead that the Senate could impose "only political, not ordinary criminal, punishments." OLC Double Jeopardy Memo at 124; *see also* Tench Coxe, An American Citizen, *Independent Gazetteer* (Philadelphia), Sept. 28, 1787 (The Senate "can only, by conviction on impeachment, *remove and incapacitate a dangerous officer* . . . ." (emphasis in original)). That approach naturally "raise[d] the question whether the other punishments the founding generation was accustomed to seeing" in British impeachment proceedings "could be imposed at all under the new American government." OLC Double Jeopardy Memo at 126. The Framers wished to make clear that a President would "still be liable to

prosecution and punishment in the ordinary course of law." The Federalist No. 65, at 321 (Alexander Hamilton) (Coventry House Publishing, 2015); Coxe, *An American Citizen* ("[T]he punishment of [a dangerous officer] as a criminal *remains within the province of the courts of law to be conducted under all the ordinary forms and precautions* . . . ." (emphasis in original)). They therefore added the provision that "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. As the Office of Legal Counsel noted, that "second part makes clear that the restriction on sanctions in the first part was not a prohibition on further punishments; rather, those punishments would still be available but simply not to the [Senate]." OLC Double Jeopardy Memo at 126–27. In short, then, the Framers intended impeached officials to face criminal liability "according to Law." U.S. CONST. art. I, § 3, cl. 7.

To counter the historical evidence that explains the purpose of the Impeachment Judgment Clause, former President Trump turns to one sentence written by Alexander Hamilton in the Federalist 69: "The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law." The Federalist No. 69, at 337 (Alexander Hamilton) (Coventry House Publishing, 2015). He focuses on the word "afterwards" and suggests that a President is not "liable to prosecution and punishment" until "after[]" he has been impeached and convicted by the Senate. *See* Appellant's Br. 14–

15. But we think the more significant word in Hamilton's statement is "liable," which means "subject to." *Liable*, 1 John Ash, New and Complete Dictionary of the English Language (1795). Hamilton specifies that a President would be *subject to* impeachment, trial, conviction and removal from office; and "afterwards" would be *subject to* prosecution and punishment, without regard to the verdict in the impeachment proceeding.[10] Moreover, in the very next sentence of the same essay, Hamilton stresses that the President must be unlike the "king of Great Britain," who was "sacred and inviolable." The Federalist No. 69, at 337–38. It strains credulity that Hamilton would have endorsed a reading of the Impeachment Judgment Clause that shields Presidents from all criminal accountability unless they are first impeached and convicted by the Congress.

Other historical evidence further supports our conclusion. For example, many founding-era sources state that an impeached-and-acquitted official may face criminal indictment and trial. Edmund Pendleton, President of the Virginia Ratifying Convention, noted that Senate "obstruction" of an impeachment charge would not allow an official to escape accountability because the people "may yet resort to the Courts of Justice, as an Acquital [sic]

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[10] Former President Trump also cites to Hamilton's statement in Federalist 77 that the President is "at all times *liable* to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by *subsequent* prosecution in the common course of law." The Federalist No. 77, at 378–79 (Alexander Hamilton) (Coventry House Publishing, 2015) (emphasis added). This argument is similarly unavailing based on Federalist 77's analogous use of "liable."

would not bar that remedy." 10 *The Documentary History of the Ratification of the Constitution* 1773 (Merrill Jensen et al, eds. 1976) (Letter from Edmund Pendleton to James Madison, Oct. 8, 1787). Similarly, James Wilson — a member of the Constitutional Convention committee that drafted the Impeachment Judgment Clause — argued as follows: "Though [Senators] may not be convicted on impeachment before the Senate, they may be tried by their country; and if their criminality is established, the law will punish. A grand jury may present, a petit jury may convict, and the judges will pronounce the punishment." *See* 2 *The Documentary History of the Ratification of the Constitution* 492 (Merrill Jensen et al, eds. 1976); *see also* 9 Annals of Cong. 2475 (1798) (statement of Rep. Dana) ("[W]hether a person tried under an impeachment be found guilty or acquitted, he is still liable to a prosecution at common law.").

In drafting the Impeachment Judgment Clause, to the extent that the Framers contemplated whether impeachment would have a preclusive effect on future criminal charges, the available evidence suggests that their intent was to ensure that a subsequent prosecution would *not* be barred. *See* OLC Double Jeopardy Memo at 122 (noting limited scope of discussion at the Constitutional Convention and ratifying conventions regarding the Impeachment Judgment Clause). Joseph Story explained that the Impeachment Judgment Clause removed doubt that "a second trial for the same offence could be had, either after an acquittal, or a conviction in the court of impeachments." 2 Story, *Commentaries* § 780; *id.* § 781 (noting the Constitution "has wisely subjected the party to trial in the common criminal tribunals, for the purpose of receiving such punishment, as

ordinarily belongs to the offence"). Story explained that without a criminal trial "the grossest official offenders might escape without any substantial punishment, even for crimes, which would subject their fellow citizens to capital punishment." *Id.* § 780.[11]

Finally, the practical consequences of former President Trump's interpretation demonstrate its implausibility. The Impeachment Judgment Clause applies not just to Presidents but also to the "Vice President and all civil Officers of the United States." U.S. CONST. art. II, § 4. Thus, his reading would prohibit the Executive Branch from prosecuting current and former civil officers for crimes committed while in office, unless the Congress first impeached and convicted them. No court has previously imposed such an irrational "impeachment first" constraint on the criminal prosecution of federal officials. *See*, *e.g.*, *Isaacs*, 493 F.2d at 1144 ("[W]e are convinced that a federal judge is subject to indictment and trial before

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[11] Former President Trump points to some historical evidence that he considers countervailing. He notes that some state constitutions explicitly provided for the criminal prosecution of a party acquitted on impeachment charges, arguing that silence on that point therefore should be inferred as precluding prosecution. But some early state constitutions also expressly granted criminal immunity to the state's chief executive, so interpreting silence is not so simple. *See* Saikrishna Bangalore Prakash, *Prosecuting and Punishing Our Presidents*, 100 Tex. L. Rev. 55, 69–70 (2021) (citing 1776 Virginia and Delaware constitutions). Any limited, indirect historical clues must be weighed against the compelling textual, structural and historical evidence that the Founders did not intend the Impeachment Judgment Clause to bar the criminal prosecution of an official who was impeached and acquitted (or not impeached at all).

impeachment . . . .").[12] Even if there is an atextual basis for treating Presidents differently from subordinate government officials, as former President Trump suggests, his proposed interpretation still would leave a President free to commit all manner of crimes with impunity, so long as he is not impeached and convicted. Former President Trump's interpretation also would permit the commission of crimes not readily categorized as impeachable (*i.e.*, as "Treason, Bribery, or other high Crimes and Misdemeanors") and, if thirty Senators are correct, crimes not discovered until after a President leaves office. *See* U.S. CONST. art. II, § 4; *see also*, *e.g.*, 167 CONG. REC. S736 (daily ed. Feb. 13, 2021) (statement of Senate Minority Leader McConnell) ("We have no power to convict and disqualify a former office holder who is now a private citizen.").[13] All of this leads us to conclude that, under the best reading of the Impeachment Judgment Clause, a former President may be criminally prosecuted in federal court, without

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[12] Indeed, history reveals examples of prosecutions preceding impeachments. *See Nixon v. United States*, 506 U.S. 224, 226–27 (1993) (defendant judge criminally prosecuted and then impeached); *Hastings v. United States Senate*, 716 F. Supp. 38, 41 (D.D.C. 1989) (same); *Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution While in Office*, Op. O.L.C. 4 (1973) (observing that, as of 1973, only 12 impeachments had occurred, but "presumably scores, if not hundreds, of officers of the United States have been subject to criminal proceedings for offenses for which they could have been impeached").

[13] *See also* statements of Senators Barrasso, Blunt, Braun, Capito, Cornyn, Cramer, Crapo, Daines, Ernst, Fischer, Grassley, Hoeven, Hyde-Smith, Inhofe, Kennedy, Lankford, Lee, Lummis, Moran, Portman, Risch, Rounds, Rubio, Shelby, Sullivan, Thune, Tillis, Tuberville and Wicker.

any requirement that he first be impeached and convicted for the same conduct.[14]

IV. DOUBLE JEOPARDY PRINCIPLES

Former President Trump alternatively argues that the Impeachment Judgment Clause and "principles of double jeopardy" bar his prosecution because he was impeached by the House of Representatives for the same or closely related conduct but acquitted by the Senate. We disagree.

As we have discussed, *supra* Part III.C, the Impeachment Judgment Clause addresses only *convicted* parties; it does not address the consequences of a Senate acquittal. For the reasons

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[14] Because we conclude that former President Trump is not entitled to categorical immunity from criminal liability for assertedly "official" acts, it is unnecessary to explore whether executive immunity, if it applied here, would encompass his expansive definition of "official acts." Nevertheless, we observe that his position appears to conflict with our recent decision in *Blassingame*, 87 F.4th at 1. According to the former President, any actions he took in his role as President should be considered "official," including all the conduct alleged in the Indictment. Appellant's Br. 41–42. But in *Blassingame*, taking the plaintiff's allegations as true, we held that a President's "actions constituting re-election campaign activity" are not "official" and can form the basis for civil liability. 87 F.4th at 17. In other words, if a President who is running for re-election acts "as office-*seeker*, not office-*holder*," he is not immune even from *civil* suits. *Id*. at 4 (emphasis in original). Because the President has no official role in the certification of the Electoral College vote, much of the misconduct alleged in the Indictment reasonably can be viewed as that of an office-*seeker* — including allegedly organizing alternative slates of electors and attempting to pressure the Vice President and Members of the Congress to accept those electors in the certification proceeding. It is thus doubtful that "all five types of conduct alleged in the indictment constitute official acts." Appellant's Br. 42.

already stated, the Clause's provision that "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law" does not bar the prosecution of an official who, like former President Trump, was acquitted rather than "convicted" in an impeachment proceeding; nor does it bar the prosecution of an official who was never impeached in the first place. U.S. CONST. art. I, § 3, cl. 7. The Clause simply does not speak to such matters. But the weight of historical authority indicates that the Framers intended for public officials to face ordinary criminal prosecution as well as impeachment. *Supra* Part III.C.

To the extent former President Trump relies on "double jeopardy principles" beyond the text of the Impeachment Judgment Clause, those principles cut against him. The Double Jeopardy Clause provides: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. It has been interpreted to prohibit "imposition of multiple criminal punishments for the same offense." *Hudson v. United States*, 522 U.S. 93, 99 (1997) (citation omitted). Under precedent interpreting the Double Jeopardy Clause, former President Trump's impeachment acquittal does not bar his subsequent criminal prosecution for two reasons: (1) An impeachment does not result in *criminal* punishments; and (2) the Indictment does not charge the same offense as the single count in the Impeachment Resolution.

A. IMPEACHMENT IS NOT "CRIMINAL"

Under the Double Jeopardy Clause, a defendant is not "put in jeopardy of life or limb," U.S. CONST. amend. V, when faced with any penalty "that could, in common parlance, be described as punishment";

instead, double jeopardy guards only against "imposition of multiple criminal punishments for the same offense." *Hudson*, 522 U.S. at 99 (cleaned up). Although double jeopardy applies only to *criminal* punishments, impeachment imposes *political* punishments.

Impeachment is a political process that is instigated and overseen by the Congress. *See* 2 Story, *Commentaries* § 784 ("There is wisdom, and sound policy, and intrinsic justice in this separation of the offence, at least so far, as the jurisdiction and trial are concerned, into its proper elements, bringing *the political part* under the power of the political department of the government . . . ." (emphasis added)); 9 Annals of Cong. 2475 (1798) (statement of Rep. Dana) ("The process in cases of impeachment, in this country, is distinct from either civil or criminal — it is a political process, having in view the preservation of the Government of the Union."). It is a tool entrusted to elected officials and "designed to enable Congress to protect the nation against officers who have demonstrated that they are unfit to carry out important public responsibilities." OLC Double Jeopardy Memo at 130; *see* The Federalist No. 66, at 324 (Alexander Hamilton) (Coventry House Publishing, 2015) ("[T]he powers relating to impeachments are, as before intimated, an essential check in the hands of [Congress] upon the encroachments of the executive."); *Mazars USA, LLP*, 140 S. Ct. at 2046 (Thomas, J., dissenting) ("The founding generation understood impeachment as a check on Presidential abuses."). The consequences imposed by an impeachment conviction — removal from office and disqualification from future service, U.S. CONST. art. I, § 3, cl. 7. — are intended to hold

officials *politically* accountable, while leaving *criminal* accountability to the Judicial Branch.

As a result of the political nature of impeachment proceedings, impeachment acquittals are often unrelated to factual innocence. *See* The Federalist No. 65, at 319 (In an impeachment proceeding, "there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt."). Former President Trump's acquittal in his impeachment trial on the charge of inciting insurrection makes this point. The forty-three Senators who voted to acquit him relied on a variety of concerns, many of which had nothing to do with whether he committed the charged offense. Those Senators cited jurisdictional reasons, *see, e.g.*, 167 CONG. REC. S736 (daily ed. Feb. 13, 2021) (statement of Senate Minority Leader McConnell) ("We have no power to convict and disqualify a former office holder who is now a private citizen."); process-based reasons, *see, e.g.*, Press Release, Sen. Todd Young, Senator Young Statement on Impeachment Trial (Feb. 13, 2021), https://perma.cc/26Z8-XYTT ("Simply put, the U.S. House of Representatives conducted a rushed and incomplete process for this snap impeachment."); and political reasons, *see, e.g.*, Press Release, Sen. Ron Johnson, Johnson Statement on Impeachment Trial of Former President Trump (Feb. 13, 2021), https://perma.cc/L4EZ-7C77 ("The Democrats' vindictive and divisive political impeachment is over. While there are still many questions that remain unanswered, I do know neither the Capitol breach nor this trial should have ever occurred. Hopefully, true healing can now begin."). Indeed, at least thirty Senators who voted to acquit relied at least in part on

a belief that the Senate lacked the power to convict a *former* President. *See supra* n.13.

Criminal prosecutions, by contrast, are aimed at "penaliz[ing] individuals for their criminal misdeeds . . . by taking away their life, liberty, or property." OLC Double Jeopardy Memo at 130; *see also Kansas v. Hendricks*, 521 U.S. 346, 361–62 (1997) (identifying "retribution [and] deterrence" as "the two primary objectives of criminal punishment"). The consequences of a criminal conviction are predicated on a finding of guilt beyond a reasonable doubt, *United States v. Gaudin*, 515 U.S. 506, 510 (1995); and such consequences can be severe, including asset forfeiture, incarceration and even death, *see, e.g.*, 18 U.S.C. §§ 982, 3581, 3591. Criminal prosecutions are overseen by the judiciary, which enforces stringent procedural protections that reflect the gravity of the potential ramifications for the defendant. *See Nixon*, 418 U.S. at 707 (describing "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions"). The Double Jeopardy Clause is one such procedural protection, ensuring that a criminal defendant is not forced to face prosecution twice for the same offense.

In light of the very different procedures and purposes associated with impeachment proceedings as compared to criminal proceedings, former President Trump's reliance on the Double Jeopardy Clause is misplaced. Impeachment is not a criminal process and cannot result in criminal punishment.[15]

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[15] When determining whether a punishment labeled "civil" by the Congress is criminal for double-jeopardy purposes, courts apply a multi-factored test. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963). Because former President Trump

He does not seriously contend otherwise; and he does not explain why he believes that impeachment can implicate "double jeopardy principles" when it does not involve criminal punishment.

B. *BLOCKBURGER* TEST

Even if we assume that an impeachment trial is criminal under the Double Jeopardy Clause, the crimes alleged in the Indictment differ from the offense for which President Trump was impeached. In determining whether two charges are the "same" for double-jeopardy purposes, courts apply "the same-elements test" (also known as the "*Blockburger* test"): If "each offense contains an element not contained in the other," the offenses are different. *United States v. Dixon*, 509 U.S. 688, 696 (1993) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)) (cleaned up). If the charges at issue are not the "same offense" under that test, double jeopardy does not bar prosecution. *Id.* at 696–97.

Under the *Blockburger* test, none of the four offenses alleged in the Indictment is the same as the sole offense charged in the article of impeachment. The indicted criminal counts include conspiracy to defraud the United States under 18 U.S.C. § 371; conspiracy to obstruct and obstructing an official proceeding under 18 U.S.C. §§ 1512(c)(2), (k); and conspiracy to deprive one or more individuals of the right to vote under 18 U.S.C. § 241. *See* Indictment ¶¶

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does not contend impeachment threatens criminal punishment, and because we think the political nature of impeachment makes that clear, we need not address those factors. *Cf.* OLC Double Jeopardy Memo at 139–48 (concluding, under the *Mendoza-Martinez* test, that removal and disqualification are not criminal punishments implicating double jeopardy).

6, 126, 128, 130. By contrast, the article of impeachment charged former President Trump with incitement of insurrection. *See* H.R. Res. 24, 117th Cong. (2021). Each of the indicted charges requires proof of an element other than those required for incitement. And the offense of incitement of insurrection requires proof of incitement — an element that is distinct from those associated with each of the crimes of indictment. In other words, the charges are not the same under a straightforward application of the *Blockburger* test.

Former President Trump does not dispute this analysis and instead contends that, rather than applying the *Blockburger* test, a subsequent criminal prosecution cannot be based on "the same or closely related conduct" as an unsuccessful impeachment. Appellant's Br. 52. But that argument is foreclosed by case law: "The 'same-conduct' rule . . . is wholly inconsistent with . . . Supreme Court precedent and with the clear common-law understanding of double jeopardy." *Dixon*, 509 U.S. at 704; *see also Hudson*, 522 U.S. at 107 (Stevens, J., concurring in the judgment) ("[T]he Double Jeopardy Clause is not implicated simply because a criminal charge involves essentially the same conduct for which a defendant has previously been punished." (cleaned up)).

Thus, well-established law interpreting the Double Jeopardy Clause undermines rather than supports former President Trump's argument that he may not be prosecuted. Perhaps recognizing that normal double-jeopardy rules disfavor his position, he claims that the Impeachment Judgment Clause incorporates "double jeopardy principles" that are distinct from the Double Jeopardy Clause. *See* Appellant's Br. 54 n.7. But if the "double jeopardy principles" he invokes are

unmoored from the Double Jeopardy Clause, we are unable to discern what the principles are or how to apply them. He thus fails to establish that his Senate acquittal bars his criminal prosecution.

* * *

We have balanced former President Trump's asserted interests in executive immunity against the vital public interests that favor allowing this prosecution to proceed. We conclude that "[c]oncerns of public policy, especially as illuminated by our history and the structure of our government" compel the rejection of his claim of immunity in this case. *See Fitzgerald*, 457 U.S. at 747–48. We also have considered his contention that he is entitled to categorical immunity from criminal liability for any assertedly "official" action that he took as President — a contention that is unsupported by precedent, history or the text and structure of the Constitution. Finally, we are unpersuaded by his argument that this prosecution is barred by "double jeopardy principles." Accordingly, the order of the district court is AFFIRMED.[16] *So ordered.*

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[16] *Amici* former Attorney General Edwin Meese III and others argue that the appointment of Special Counsel Smith is invalid because (1) no statute authorizes the position Smith occupies and (2) the Special Counsel is a principal officer who must be nominated by the President and confirmed by the Senate. *See* U.S. CONST. art. II, § 2, cl. 2 (Appointments Clause). On appeal from a collateral order, we generally lack jurisdiction to consider issues that do not independently satisfy the collateral order doctrine unless we can exercise pendent jurisdiction over the issue. *See Abney*, 431 U.S. at 663; *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 874 (D.C. Cir. 2019). Because the Appointments Clause issue was neither presented to nor decided by the district court, there is no order on the issue that could even arguably constitute a collateral order for us to review. Additionally, the exercise of

pendent jurisdiction would be improper here, assuming without deciding that pendent jurisdiction is *ever* available in criminal appeals. *See Abney*, 431 U.S. at 663; *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 679 (D.C. Cir. 1996).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-3228 **September Term, 2023**

FILED ON: FEBRUARY 6, 2024

UNITED STATES OF AMERICA,

APPELLEE

v.

DONALD J. TRUMP,

APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:23-cr-00257-1)

Before: HENDERSON, CHILDS and PAN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the order of the District Court appealed from in this cause be affirmed, in accordance with the opinion of the court filed herein this date.

The Clerk is directed to withhold issuance of the mandate through February 12, 2024. If, within that period, Appellant notifies the Clerk in writing that he has filed an application with the Supreme Court for a stay of the mandate pending the filing of a petition for

a writ of certiorari, the Clerk is directed to withhold issuance of the mandate pending the Supreme Court's final disposition of the application. The filing of a petition for rehearing or rehearing en banc will not result in any withholding of the mandate, although the grant of rehearing or rehearing en banc would result in a recall of the mandate if the mandate has already issued. *See* D.C. Cir. R. 41(a)(4).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: */s/*

Daniel J. Reidy
Deputy Clerk

Date: February 6, 2024

Opinion Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Action No. 23-257 (TSC)

UNITED STATES OF AMERICA,

v.

DONALD J. TRUMP,

Defendant.

MEMORANDUM OPINION

The United States has charged former President Donald J. Trump with four counts of criminal conduct that he allegedly committed during the waning days of his Presidency. *See* Indictment, ECF No. 1. He has moved to dismiss the charges against him based on Presidential immunity, ECF No. 74 ("Immunity Motion"), and on constitutional grounds, ECF No. 113 ("Constitutional Motion").[1] For the reasons set forth below, the court will DENY both motions.

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[1] Defendant has also moved to dismiss based on statutory grounds, ECF No. 114, and for selective and vindictive prosecution, ECF No. 116. The court will address those motions separately. 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) (citations omitted). The court therefore rules first on the Immunity Motion and the Constitutional Motion—in which Defendant asserts "constitutional immunity from double jeopardy," *United States v. Scott*, 464 F.2d 832, 833 (D.C. Cir. 1972).

I. BACKGROUND

At the motion to dismiss stage, the court assumes the truth of the Indictment's allegations. *See, e.g.*, *United States v. Weeks*, 636 F. Supp. 3d 117, 120 (D.D.C. 2022). Defendant contends that the charges in the Indictment are based on his "public statements and tweets about the federal election and certification," "communications with the U.S. Department of Justice about investigating elections crimes and possibly appointing a new Acting Attorney General," "communications with state officials about the federal election and the exercise of their official duties with respect to the election," "communications with the Vice President and Members of Congress about the exercise of their official duties in the election-certification proceedings," and "organizing slates of electors as part of the attempt to convince legislators not to certify the election against defendant." Immunity Motion at 3–8 (formatting modified). Those generalized descriptions fail to properly portray the conduct with which he has been charged. Accordingly, the court will briefly review the central allegations as set forth in the Indictment.

Defendant "was the forty-fifth President of the United States and a candidate for re-election in 2020." Indictment ¶ 1. "Despite having lost" that election, he "was determined to remain in power," so "for more than two months following election day on November 3, 2020, the Defendant spread lies that there had been outcome-determinative fraud in the election and that he had actually won." *Id.* ¶ 2. He "knew that [those claims] were false," but "repeatedly and widely disseminated them anyway—to make his knowingly false claims appear legitimate, create an intense national atmosphere of mistrust and anger, and erode

public faith in the administration of the election." *Id.*; *see id.* ¶ 12 (listing six such claims). "In fact, the Defendant was notified repeatedly that his claims were untrue—often by the people on whom he relied for candid advice on important matters, and who were best positioned to know the facts and he deliberately disregarded the truth." *Id.* ¶ 11. Those people included the Vice President, "senior leaders of the Justice Department," the Director of National Intelligence, the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency, "Senior White House attorneys," "Senior staffers on the Defendant's 2020 re-election campaign," state legislators and officials, and state and federal judges. *Id.*

"Defendant also pursued unlawful means of discounting legitimate votes and subverting the election results." *Id.* ¶ 4. Specifically, he "targeted a bedrock function of the United States federal government: the nation's process of collecting, counting, and certifying the results of the presidential election." *Id.* The Indictment describes that process:

> The Constitution provided that individuals called electors select the president, and that each state determine for itself how to appoint the electors apportioned to it. Through state laws, each of the fifty states and the District of Columbia chose to select their electors based on the popular vote in the state. After election day, the [Electoral Count Act ("ECA")] required each state to formally determine—or 'ascertain'—the electors who would represent the state's voters by casting electoral votes on behalf of the candidate who had won the popular vote, and required the executive of each state to certify to

> the federal government the identities of those electors. Then, on a date set by the ECA, each state's ascertained electors were required to meet and collect the results of the presidential election—that is, to cast electoral votes based on their state's popular vote, and to send their electoral votes, along with the state executive's certification that they were the state's legitimate electors, to the United States Congress to be counted and certified in an official proceeding. Finally, the Constitution and ECA required that on the sixth of January following election day, the Congress meet in a Joint Session for a certification proceeding, presided over by the Vice President as President of the Senate, to count the electoral votes, resolve any objections, and announce the result—thus certifying the winner of the presidential election as president-elect.

Id. ¶ 9.

Defendant, along with at least six co-conspirators, *id.* ¶ 8, undertook efforts "to impair, obstruct, and defeat [that process] through dishonesty, fraud, and deceit," *id.* ¶ 10. Those efforts took five alleged forms:

First, they "used knowingly false claims of election fraud to get state legislators and election officials to subvert the legitimate election results and change electoral votes for the Defendant's opponent, Joseph R. Biden, Jr., to electoral votes for the Defendant." *Id.* ¶ 10(a). "That is, on the pretext of baseless fraud claims, the Defendant pushed officials in certain states to ignore the popular vote; disenfranchise millions of voters; dismiss legitimate electors; and ultimately, cause the ascertainment of and voting by

illegitimate electors in favor of the Defendant." *Id*.; *see id*. ¶¶ 13–52.

Second, they "organized fraudulent slates of electors in seven targeted states (Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin), attempting to mimic the procedures that the legitimate electors were supposed to follow under the Constitution and other federal and state laws." *Id*. ¶ 10(b). "This included causing the fraudulent electors to meet on the day appointed by federal law on which legitimate electors were to gather and cast their votes; cast fraudulent votes for the Defendant; and sign certificates falsely representing that they were legitimate electors." *Id*.; *see id*. ¶¶ 53–69. They "then caused these fraudulent electors to transmit their false certificates to the Vice President and other government officials to be counted at the certification proceeding on January 6," 2021. *Id*. ¶ 10(b); *see id*. ¶¶ 53–69.

Third, they "attempted to use the power and authority of the Justice Department to conduct sham election crime investigations and to send a letter to the targeted states that falsely claimed that the Justice Department had identified significant concerns that may have impacted the election outcome; that sought to advance the Defendant's fraudulent elector plan by using the Justice Department's authority to falsely present the fraudulent electors as a valid alternative to the legitimate electors; and that urged, on behalf of the Justice Department, the targeted states' legislatures to convene to create the opportunity to choose the fraudulent electors over the legitimate electors." *Id*. ¶ 10(c); *see id*. ¶¶ 70–85.

Fourth, "using knowingly false claims of election fraud," they "attempted to convince the Vice President to use the Defendant's fraudulent electors, reject legitimate electoral votes, or send legitimate electoral votes to state legislatures for review rather than counting them." *Id.* ¶ 10(d). "When that failed, on the morning of January 6," they "repeated knowingly false claims of election fraud to gathered supporters, falsely told them that the Vice President had the authority to and might alter the election results, and directed them to the Capitol to obstruct the certification proceeding and exert pressure on the Vice President to take the fraudulent actions he had previously refused." *Id.*; *see id.* ¶¶ 86–105.

Fifth, "on the afternoon of January 6," once "a large and angry crowd—including many individuals whom the Defendant had deceived into believing the Vice President could and might change the election results—violently attacked the Capitol and halted the proceeding," they "exploited the disruption by redoubling efforts to levy false claims of election fraud and convince members of Congress to further delay the certification based on those claims." *Id.* ¶ 10(e); *see id.* ¶¶ 106–124.

Based on this conduct, the Indictment charges Defendant with four counts: Conspiracy to Defraud the United States, in violation of 18 U.S.C. § 371, *id.* ¶ 6; Conspiracy to Obstruct an Official Proceeding, in violation of 18 U.S.C. § 1512(k), *id.* ¶ 126; Obstruction of, and Attempt to Obstruct, an Official Proceeding, in violation of 18 U.S.C. §§ 1512(c)(2), 2, *id.* ¶ 128; and Conspiracy Against Rights, in violation of 18 U.S.C. § 241, *id.* ¶ 130.

II. LEGAL STANDARD

A criminal defendant may move to dismiss based on a "defect in the indictment," such as a "failure to state an offense." Fed. R. Crim. P. 12(b)(3)(B)(v). That motion may be based—as it is here—on constitutional challenges to the prosecution, including the assertion of immunity. *See, e.g., United States v. Stone*, 394 F. Supp. 3d 1, 8 (D.D.C. 2019). "Because a court's use of its supervisory power to dismiss an indictment directly encroaches upon the fundamental role of the grand jury, dismissal is granted only in unusual circumstances." *United States v. Fischer*, 64 F.4th 329, 334–35 (D.C. Cir. 2023) (formatting modified).

III. EXECUTIVE IMMUNITY

Defendant contends that the Constitution grants him "absolute immunity from criminal prosecution for actions performed within the 'outer perimeter' of his official responsibility" while he served as President of the United States, so long as he was not both impeached and convicted for those actions. Immunity Motion at 8, 11–13 (formatting modified). The Constitution's text, structure, and history do not support that contention. No court—or any other branch of government—has ever accepted it. And this court will not so hold. Whatever immunities a sitting President may enjoy, the United States has only one Chief Executive at a time, and that position does not confer a lifelong "get-out-of-jail-free" pass. Former Presidents enjoy no special conditions on their federal criminal liability. Defendant may be subject to federal investigation, indictment, prosecution, conviction, and punishment for any criminal acts undertaken while in office.

A. Text

In interpreting the Constitution, courts ordinarily "begin with its text," *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997), but there is no provision in the Constitution conferring the immunity that Defendant claims. The Supreme Court has already noted "the absence of explicit constitutional . . . guidance" on whether a President possesses any immunity. *Nixon v. Fitzgerald*, 457 U.S. 731, 747 (1982) ("*Fitzgerald*"); see also *United States v. Nixon*, 418 U.S. 683, 705–06 n.16 (1974) ("*Nixon*") (observing "the silence of the Constitution" regarding a President's immunity from criminal subpoenas). The Executive Branch has likewise recognized that "the Constitution provides no explicit immunity from criminal sanctions for any civil officer," including the current President. *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 U.S. Op. Off. Legal Counsel 222, 2000 WL 33711291, at *9 (2000) ("OLC Immunity Memo") (quoting Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity at 4 (filed Oct. 5, 1973), *In re Proceedings of the Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew, Vice President of the United States* (D. Md. 1973) (No. 73-965) ("1973 SG Memo"), *available at* 27 Hofstra L. Rev. 677, 775–97 (Appendix)) (alterations adopted). There is no "Presidential Immunity" Clause.

The lack of constitutional text is no accident; the Framers explicitly created immunity for other officials. The Constitution's Speech and Debate Clause provides that "Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective

Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. And some Founding-Era state constitutions, like those of Virginia and Delaware, unequivocally protected their Governor from certain penal sanctions, at least until "he [was] out of office." Saikrishna Bangalore Prakash, *Prosecuting and Punishing Our Presidents*, 100 Tex. L. Rev. 55, 69 (2021) (quoting Va. Const. of 1776, art. XVI); *accord id.* at 69–70 (quoting Del. Const. of 1776, art. XXIII). The U.S. Constitution contains no equivalent protections for the President.

Nor is the Constitution silent on the question because its drafters and ratifiers assumed the President would enjoy the immunity Defendant claims. To the contrary, America's founding generation envisioned a Chief Executive wholly different from the unaccountable, almost omnipotent rulers of other nations at that time. In Federalist No. 69—titled "The Real Character of the Executive"—Alexander Hamilton emphasized the "total dissimilitude between [the President] and the king of Great Britain," the latter being "sacred and inviolable" in that "there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected." *The Federalist Papers by Alexander Hamilton, James Madison and John Jay* 348–49 (Garry Wills ed. 1982).[2] Hamilton's contemporary commentators universally affirmed the crucial distinction that the President would at some point be

[2] All subsequent citations to the Federalist Papers refer to this edition, and the Papers are also available online at https://avalon.law.yale.edu/subject_menus/fed.asp.

subject to criminal process. *See* Prakash, 100 Tex. L. Rev. at 71–75 (collecting commentary); Response, Brian C. Kalt, *Criminal Immunity and Schrödinger's President: A Response to* Prosecuting and Punishing Our Presidents, 100 Tex. L. Rev. Online 79, 83–85 (2021) (acknowledging Founding-Era consensus that Presidents would lack absolute criminal immunity, but noting that most commentary was ambiguous about whether prosecution could occur during Presidency, or only after). That widely acknowledged contrast between the President and a king is even more compelling for a former President. The Constitution's silence on former Presidents' criminal immunity thus does not reflect an understanding that such immunity existed.

Lacking an express constitutional provision, Defendant hangs his textual argument for immunity on the Impeachment Judgment Clause, but it cannot bear the weight he places on it. The Clause provides:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: 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. From this language, Defendant concludes "that the President may be charged by indictment only in cases where the President has been impeached and convicted by trial in the Senate." Immunity Motion at 11. But Defendant is not President, and reading the Clause to grant absolute criminal immunity to former Presidents would contravene its plain meaning, original understanding, and common sense.

The Clause has two parts. The first limits the penalties of impeachment to removal and disqualification from office. That limit marked a deliberate departure from the prevailing British tradition, in which an impeachment conviction "might result in a wide array of criminal penalties, including fines, imprisonment, and even execution." *Whether A Former President May Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate*, 24 U.S. Op. Off. Legal Counsel 110, 2000 WL 33711290, at *7 (2000) ("OLC Double Jeopardy Memo") (citing 2 Joseph Story, *Commentaries on the Constitution of the United States* 251–2 (1833; reprint 1994) ("*Story's Commentaries*"); 2 Richard Wooddeson, *A Systematical View of the Laws of England* 611–14 (1792); Raoul Berger, *Impeachment: The Constitutional Problems* 67 (1974)). The second part of the Clause provides, however, that impeachment's limits do not preclude "the Party convicted" from later criminal prosecution in the courts—i.e., that "further punishment[] . . . would still be available but simply not to the legislature." *Id.* at *10.

Both parts of the Clause undercut Defendant's interpretation of it. The first begins by defining the Clause's scope: "Judgment in Cases of Impeachment," indicating that the Clause is aimed primarily at identifying the permissible penalties associated with impeachment itself. The Clause's second part confirms that purview. Rather than stating that "the Party convicted shall *only then* be liable" to criminal prosecution, the Clause states that "the Party convicted shall *nevertheless* be liable." U.S. Const. art. I, § 3, cl. 7 (emphasis added). At the Founding, as now, "nevertheless" meant "notwithstanding that," and

"notwithstanding that" meant "[w]ithout hindrance or obstruction from." *Neverthele'ss*, Samuel Johnson, *A Dictionary Of The English Language* (1978) (4th ed. 1773), *available at* https://perma.cc/ST8E-RCMB; *id.*, *Notwithsta'nding*, *available at* https://perma.cc/A9ML-QK4Y. In the Impeachment Judgment Clause, the word "nevertheless" in the second part thus signifies that the first part—constraining impeachment's penalties—does not bear on whether the Party would also be subject to criminal prosecution. See OLC Immunity Memo at *2 (citing *Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office* (1973) ("1973 OLC Memo"), *available at* https://perma.cc/DM28-LHT9). As discussed at greater length below, the Clause's manifest purpose—and originally understood effect—was therefore "to permit criminal prosecution in spite of the prior adjudication by the Senate, i.e., to forestall a double jeopardy argument." *Id.* (citation omitted); *see infra* Section V.B. That is quite different from establishing impeachment and conviction as a prerequisite to a former President's criminal prosecution.

The historical sources that Defendant cites do not move the needle. First, he quotes Alexander Hamilton's twin statements in *The Federalist* that the "President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law," Federalist No. 69 at 348, and that the President would be "at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by

subsequent prosecution in the common course of law," Federalist No. 77 at 392. Immunity Motion at 12. But those statements merely echo the Clause's clarification that prosecution may follow impeachment; they do not say that those events *must* happen in that order. Second, Defendant cites Founding Father James Wilson's remark during the ratification debates that the President "is amenable to [the laws] in his private character as a citizen, and in his public character by impeachment." J. Elliot, *Debates on The Federal Constitution* 480 (2d ed. 1863). But Wilson was describing a President in office, *see id.*, and that description is entirely consistent with a former President—having returned to life "as a citizen"—being subject to criminal prosecution. There is no evidence that any of the Constitution's drafters or ratifiers intended or understood former Presidents to be criminally immune unless they had been impeached and convicted, much less a widespread consensus that the Impeachment Judgment Clause would have that effect.

In addition to lacking textual or historical support, Defendant's interpretation of the Clause collapses under the application of common sense. For one, his reasoning is based on the logical fallacy of "denying the antecedent." *See, e.g., New LifeCare Hosps. of N.C. LLC v. Azar*, 466 F. Supp. 3d 124, 136 n.7 (D.D.C. 2020). From the statement "if the animal is a cat, it can be a pet," it does not follow that "if the animal is not a cat, it cannot be a pet." Yet Defendant argues that because a President who is impeached and convicted may be subject to criminal prosecution, "a President who is *not* convicted may *not* be subject to criminal prosecution." Immunity Motion at 11. Even assuming that negative implication finds some

traction when applied to sitting Presidents, *see, e.g.*, *Trump v. Vance*, 140 S. Ct. 2412, 2444–45 (2020) (Alito, J., dissenting) (discussing that implication); *but see* OLC Immunity Memo at *2–3 (restating the 1973 OLC Memo's rejection of the implication); *see also infra* Section V.B (discussing the implication for double jeopardy purposes), the logic certainly does not hold for former Presidents. That is because there is another way, besides impeachment and conviction, for a President to be removed from office and thus subjected to "the ordinary course of law," Federalist No. 69 at 348: As in Defendant's case, he may be voted out. The President "shall hold his Office during the Term of four Years." U.S. Const. art. II, § 1, cl. 1. Without reelection, the expiration of that term ends a Presidency as surely as impeachment and conviction. *See United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (Marshall, Circuit Justice) ("[T]he president is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again."). Nothing in the Impeachment Judgment Clause prevents criminal prosecution thereafter.

Defendant's reading of the Impeachment Judgment Clause also proves too much. If the Clause required impeachment and conviction to precede criminal prosecution, then that requirement would apply not only to the President, but also to the "Vice President and all civil Officers of the United States"—who may likewise be impeached. U.S. Const. art. II, § 4. "The constitutional practice since the Founding, however, has been to prosecute and even imprison civil officers other than the President . . . prior to their impeachment." OLC Immunity Memo at *2 (citing 1973 OLC Memo at 4–7 (collecting sources)). For

instance, then-Vice President Aaron Burr was indicted without being impeached, *see* 1973 SG Memo at 12, and the same fate might have befallen Vice President Spiro Agnew had he not resigned and entered a *nolo contendere* plea, *see United States v. Agnew*, 428 F. Supp. 1293, 1293 (D. Md. 1977). Not only would Defendant's interpretation contradict that long-settled practice, it would also introduce significant "complications into criminal proceedings" for all current and former federal officials, including "threshold constitutional questions" of "whether the suspect is or was an officer of the United States," and "whether the offense is one for which he could be impeached." OLC Immunity Memo at *3 (citing 1973 OLC Memo at 7). The clash with historical practice and difficulties in application that would flow from Defendant's interpretation further confirm that it cannot be the correct reading of the Clause.

Finally, Defendant's interpretation of the Impeachment Judgment Clause would produce implausibly perverse results. The Constitution permits impeachment and conviction for a limited category of offenses: "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. II, § 4. Under Defendant's reading, if a President commits a crime that does not fall within that limited category, and so could not be impeached and convicted, the President could never be prosecuted for that crime. Alternatively, if Congress does not have the opportunity to impeach or convict a sitting President—perhaps because the crime occurred near the end of their term, or is covered up until after the President has left office—the former President similarly could not be prosecuted. Defendant seems to suggest that this scenario, in which the former

President would be utterly unaccountable for their crimes, is simply the price we pay for the separation of powers. *See* Reply in Support of Immunity Motion, ECF No. 122, at 6 (quoting *Morrison v. Olson*, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting) ("While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty.")).[3] That cannot be the Clause's meaning. The constitutional limits on impeachment's penalties do not license a President's criminal impunity.

In sum, nothing in the Constitution's text supplies the immunity that Defendant claims. To be sure, "a specific textual basis has not been considered a prerequisite to the recognition of immunity," and so the inquiry is not confined to the express terms of our founding charter. *Fitzgerald*, 457 U.S. at 750 n.31. But the lack of supporting constitutional text does mean that a former President's federal criminal immunity, if it exists, must arise entirely from "concerns of public policy, especially as illuminated by our history and the structure of our government." *Id.* at 747–48. Defendant's resort to those principles fares no better.

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[3] Even assuming that former as well as sitting Presidents may be impeached, this hypothetical would still produce problematic results. Congress could enable a former President's criminal prosecution by impeaching them after they have left office. But it would raise serious separation of powers concerns to restrain the core executive act of prosecuting a private citizen—as a former President would then be—until Congress chose to do so. *See infra* Section III.B.2.

B. Structure

The Supreme Court has cautioned against forms of Presidential liability that "rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Clinton v. Jones*, 520 U.S. 681, 702 (1997). But the prospect of federal criminal liability for a former President does not violate that structural principle, either by imposing unacceptable risks of vexatious litigation or by otherwise chilling the Executive's decision-making process. Indeed, it is likely that a President who knows that their actions may one day be held to criminal account will be motivated to take greater care that the laws are faithfully executed. More fundamentally, federal criminal liability is essential to the public's interest in our "historic commitment to the rule of law . . . nowhere more profoundly manifest than in our view that 'the twofold aim of criminal justice is that guilt shall not escape or innocence suffer.'" *Nixon*, 418 U.S. at 708–09 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)) (formatting modified). The Presidency's unique responsibilities do not exempt its former occupants from that commitment.

In *Fitzgerald*, the Supreme Court explained the structural analysis for Presidential immunity. In that case, civil plaintiff A. Ernest Fitzgerald claimed that President Richard Nixon had been involved in unlawfully firing him from his government job and sought money damages against the former President. 457 U.S. at 733–41. The five-Justice majority noted it was "settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." *Id.* at 753–54 (citations omitted). But it instructed that "a court,

before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." *Id.* at 754 (citations omitted). "When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, or to vindicate the public interest in an ongoing criminal prosecution—the exercise of jurisdiction has been held warranted." *Id.* (first citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), then citing *Nixon*, 418 U.S. 731). Ultimately, the Court found that a "merely private suit for damages based on a President's official acts" did not serve those interests, and held that a former President could remain immune from such suits. *Id.* For a federal criminal prosecution, however, the analysis comes out the other way.

1. Burdens on the Presidency

At the outset, it bears noting that it is far less intrusive on the functions of the Executive Branch to prosecute a former President than a sitting one. The Supreme Court has accepted at least "the initial premise" that the President "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 697–98. And the Office of Legal Counsel has identified three burdens of criminal prosecution that could impede the performance of that constitutional role:

> (a) the actual imposition of a criminal sentence of incarceration, which would make it physically impossible for the President to carry out his duties; (b) the public stigma and

> opprobrium occasioned by the initiation of criminal proceedings, which could compromise the President's ability to fulfill his constitutionally contemplated leadership role with respect to foreign and domestic affairs; and (c) the mental and physical burdens of assisting in the preparation of a defense for the various stages of the criminal proceedings, which might severely hamper the President's performance of his official duties.

OLC Immunity Memo at *19. But none of those burdens would result from the criminal prosecution of a former President, who is no longer performing official duties. Accordingly, the separation-of-powers concerns are significantly diminished in this context.

Fitzgerald nonetheless suggested that the prospect of post-Presidency civil liability might "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." 457 U.S. at 753. The Supreme Court highlighted two concerns: (1) the public interest in providing the President "the maximum ability to deal fearlessly and impartially with the duties of his office," and (2) the fact that given the "visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages." *Id*. at 752–53 (quotation omitted). Defendant correspondingly focuses his arguments for immunity on (1) "the chilling effect personal liability would have on the President's decision-making," and (2) the "potential criminal prosecutions" former Presidents could face from "local, state, or subsequent federal officials." Immunity Motion at 9–10. He contends that "[c]ognizance 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*. at 10 (quoting *Fitzgerald*, 457 U.S. at 753).

Those concerns do not carry the same weight in the context of a former President's federal criminal prosecution. First, the Supreme Court has largely rejected similar claims of a "chilling effect" from the possibility of future criminal proceedings. During the Watergate prosecution, President Nixon argued that if recordings of his conversations were subject to criminal subpoena, the Presidential decision-making process would be compromised because his staff would be less candid. *Nixon*, 418 U.S. at 705–06. The Court disagreed, stating that it "cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." *Id*. at 712. The Court quoted Justice Cardozo's unanimous opinion finding that a jury's decision-making process would not be meaningfully chilled if jurors' conduct were later subject to criminal prosecution:

> A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence of malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their

> repressive power is too remote and shadowy to shape the course of justice.

Id. n.20 (quoting *Clark v. United States*, 289 U.S. 1, 16 (1933)).

The same reasoning applies here. There is no doubt that "a President must concern himself with matters likely to arouse the most intense feelings." *Fitzgerald*, 457 U.S. at 752 (internal quotation marks omitted). But "[c]riminal conduct is not part of the necessary functions performed by public officials." *United States v. Isaacs*, 493 F.2d 1124, 1144 (7th Cir. 1974). By definition, the President's duty to "take Care that the Laws be faithfully executed" does not grant special latitude to violate them. U.S. Const., art. II, § 3. That is especially true when the violations require criminal intent, as is the case here, *see* Opp'n to Immunity Motion, ECF No. 109, at 31–32 (reviewing *mens rea* requirements for the Indictment's four counts); *cf. Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) (noting that even public officials "cloaked with absolute civil immunity . . . could be punished criminally" for their "willful acts"). Like his fellow citizens serving on juries, then, a President "of integrity and reasonable firmness" will not fear to carry out his lawful decision-making duties—even on hot-button political issues—and "will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor." *Clark*, 289 U.S. at 16. The rationale for immunizing a President's controversial decisions from civil liability does not extend to sheltering his criminality.

Indeed, the possibility of future criminal liability might encourage the kind of sober reflection that would reinforce rather than defeat important

constitutional values. If the specter of subsequent prosecution encourages a sitting President to reconsider before deciding to act with criminal intent, that is a benefit, not a defect. "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). Consequently, to the extent that there are any cognizable "chilling effects" on Presidential decision-making from the prospect of criminal liability, they raise far lesser concerns than those discussed in the civil context of *Fitzgerald*. Every President will face difficult decisions; whether to intentionally commit a federal crime should not be one of them.

Second, the possibility of vexatious post-Presidency litigation is much reduced in the criminal context. Defendant protests that denying him immunity would subject future Presidents to "prosecution in countless federal, state, and local jurisdictions across the country," Immunity Motion at 10, but that is incorrect. To begin, Defendant is only charged with federal crimes in this case, so any ruling here will be limited to that context and would not extend to state or local prosecutions—which in any event might run afoul of the Supremacy Clause, *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)). And as Defendant well knows, *see infra* Section V.A, a person cannot "be

subject for the same offence to be twice put in jeopardy of life or limb," U.S. Const., amend. V. Consequently, denying Defendant immunity here means only that a former President may face one federal prosecution, in one jurisdiction, for each criminal offense allegedly committed while in office. That consequence stands in contrast to the civil context, where "the effect of [the President's] actions on countless people" could result in untold numbers of private plaintiffs suing for damages based on any number of Presidential acts. *Fitzgerald*, 457 U.S. at 753.

Defendant also warns that if he is not given immunity here, criminal prosecutions will "bedevil[] every future Presidential administration and usher[] in a new era of political recrimination and division." Immunity Motion at 11. But, as the Supreme Court noted when faced with a similar argument in *Clinton*, that "predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case." 520 U.S. at 702. As Defendant acknowledges, he is the only former President in United States history to face criminal charges for acts committed while in office. *See* Immunity Motion at 15. "If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency." *Clinton*, 520 U.S. at 702. Despite Defendant's doomsaying, he points to no evidence that his criminal liability in this case will open the gates to a waiting flood of future federal prosecutions.

The robust procedural safeguards attendant to federal criminal prosecutions further reduce the likelihood that former Presidents will be unjustly harassed. Prosecutors themselves are constitutionally bound to not abuse their office, which is why "courts

presume that they have properly discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)). And a federal indictment is issued by a grand jury, which is similarly "prohibited from engaging in 'arbitrary fishing expeditions' and initiating investigations 'out of malice or an intent to harass.'" *Vance*, 140 S. Ct. at 2428 (quoting *United States v. R. Enters., Inc.*, 498 U.S. 292, 299 (1991)). Even after indictment, "in the event of such harassment, a [former] President would be entitled to the protection of federal courts," which "have the tools to deter and, where necessary, dismiss" vexatious prosecutions. *Id*. For instance, if a prosecution is politically motivated, as Defendant has argued in this case, that alone may warrant dismissal. *See* Motion to Dismiss Case for Selective and Vindictive Prosecution, ECF No. 116. And if a meritless prosecution somehow reached trial, a former President would still have the opportunity to put the government's proof to the test. *See* U.S. Const., art. III, § 2, cl. 3.

In short, the concerns discussed in the civil context of *Fitzgerald* find no meaningful purchase here. A former President accused of committing a crime while in office will be subject to only one federal prosecution for that offense, which in turn will only result in conviction if the grand jury finds probable cause and the prosecutor, judge, and all twelve petit jurors agree that the charges are legitimate and have been proven beyond a reasonable doubt. Throughout that process, a former President "may avail himself of the same protections available to every other citizen." *Vance*, 140 S. Ct. at 2430. In the rare case when a former President must do so, the Constitution does not

proffer the sledgehammer of absolute immunity where the scalpel of procedural protections will suffice. *See Burr*, 25 F. Cas. at 34 ("The guard, furnished to this high officer [the President], to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to [] precede their being issued."). The possibility of future harassing federal criminal prosecution will not cast so "serious" a shadow on the Presidency that its current occupant cannot fulfill its duties. *Clinton*, 520 U.S. at 708.

2. Public interest

On the other of side of the scale, the public interest in the prosecution of this case carries grave weight. The Supreme Court has repeatedly underscored its judgment that "the public interest in fair and accurate judicial proceedings is at its height in the criminal setting." *Vance*, 140 S. Ct. at 2424. It has correspondingly refused to permit other concerns, including those asserted by Presidents, to "prevail over the fundamental demands of due process of law in the fair administration of criminal justice." *Nixon*, 418 U.S. at 713; *see United States v. Gillock*, 445 U.S. 360, 373 (1980) (concluding that "principles of comity" must yield "where important federal interests are at stake, as in the enforcement of federal criminal statutes"). Despite their other vehement disagreements in *Fitzgerald*, all nine Justices unanimously endorsed that judgment with respect to former Presidents. Justice Powell's majority opinion specifically contrasted the "lesser public interest in actions for civil damages than . . . in criminal prosecutions." 457 at 754 n.37. Chief Justice Burger's concurrence made the same distinction. *Id*. at 759–60

(distinguishing immunity "limited to civil damages claims" from "a *criminal* prosecution," as in *Burr* or *Nixon* (emphasis in original)). And Justice White's four-member dissent stressed that no party had argued "that the President is immune from criminal prosecution in the courts[,] . . . [n]or would such a claim be credible." *Id.* at 780. *Fitzgerald* was thus undivided in contemplating that the public interest could require a former President's criminal liability.

Defendant resists that consensus in *Fitzgerald* by pointing to a single passage in the majority opinion where, in listing the "formal and informal checks" that could replace civil liability as a deterrent for Presidential misconduct, the Court did not specifically list criminal liability. *Id.* at 757. From that omission, Defendant infers that the Court intended to suggest that criminal liability would not be available either. Immunity Motion at 13. But the Court's unanimous emphasis that it was not immunizing former Presidents from federal criminal liability squarely refutes that inference. If anything, the omission underscores that civil and criminal liability are so fundamentally distinct that they cannot be understood as substitutes for one another. Accordingly, in the parallel context of cases "which have recognized an immunity from civil suit for state officials," the Supreme Court has explicitly "presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials." *Gillock*, 445 U.S. at 372.

It is no surprise that the Supreme Court has long recognized the special public interest in criminal law because of its distinctly communal character; that character is reflected in both the Constitution itself and the legal tradition from which it arose. Unlike

defendants in a civil matter, for example, federal criminal defendants are constitutionally guaranteed "a speedy and public trial" before a jury drawn from their community. U.S. Const., amend VI; *id*., art. III, § 2, cl. 3. And the preeminent 18th-century legal commentator William Blackstone explained the reason for the community's special involvement in criminal cases: Whereas civil injuries "are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals," crimes "are a breach and violation of the public rights and duties due to the whole community, considered as a community." 4 William Blackstone, *Commentaries* *5. The fundamentally public interest in a criminal prosecution explains why it "may proceed without the consent of the victim and why it is brought in the name of the sovereign rather than the person immediately injured by the wrong." OLC Immunity Memo at *22. Put differently, the very name of this case confirms the public's particular stake in its adjudication: it is the *United States of America v. Donald J. Trump*.

Congress has also affirmed the special public interests in enforcing the criminal law. In the Sentencing Reform Act of 1984, it required every federal court to consider certain factors in imposing sentence, and declared "the need for the sentence imposed":

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;

> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2); *see* Pub. L. 98-473, title II, § 212(a)(2) (1984). The public has an undisputed interest in promoting respect for the law, deterring crime, protecting itself, and rehabilitating offenders. All of those interests would be thwarted by granting former Presidents absolute criminal immunity.

The fact that Congress has spoken by criminalizing the conduct with which Defendant is charged also highlights the separation of powers principles that counsel in favor of the court retaining jurisdiction over this case. "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Congress could have penalized the conduct alleged in this case—if it chose to penalize it at all—with mere civil liability, perhaps allowing for monetary damages should a private plaintiff choose to bring suit. Instead, it expressed a far stronger condemnation by subjecting that conduct to the severe consequences of the criminal law. "Whatever may be the case with respect to civil liability" for former Presidents, then, "the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress.'" *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974) (quoting *Gravel v. United States*, 408 U.S. 606, 627 (1972)). Indeed, stretching the doctrine so far would also "imped[e] . . . the primary constitutional duty of the Judicial Branch to

do justice in criminal prosecutions," *Nixon*, 418 U.S. at 707, not to mention the current President's duty to enforce the criminal law, *see* U.S. Const., art. II, § 3. Holding a former President absolutely immune would thus impinge on the functions of all three branches with respect to the criminal law: Congress's province to make it, the Executive's prerogative to enforce it, and the Judiciary's charge to apply it.

Most importantly, a former President's exposure to federal criminal liability is essential to fulfilling our constitutional promise of equal justice under the law. "The government of the United States has been emphatically termed a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). As the Supreme Court has stated, that principle must govern citizens and officials alike:

> No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

United States v. Lee, 106 U.S. 196, 220 (1882).

Perhaps no one understood the compelling public interest in the rule of law better than our first former President, George Washington. His decision to voluntarily leave office after two terms marked an extraordinary divergence from nearly every world leader who had preceded him, ushering in the sacred

American tradition of peacefully transitioning Presidential power—a tradition that stood unbroken until January 6, 2021. In announcing that decision, however, Washington counseled that the newfound American independence carried with it a responsibility. "The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government." Washington's Farewell Address, S. Doc. No. 106-21, at 13 (2d Sess. 2000), *available at* https://perma.cc/E5CZ-7NNP. He issued a sober warning: "All obstructions to the execution of the laws," including group arrangements to "counteract" the "regular deliberation and action of the constituted authorities, are destructive of this fundamental principle." *Id*. at 14. In Washington's view, such obstructions would prove "fatal" to the Republic, as "cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion." *Id*.

In this case, Defendant is charged with attempting to usurp the reins of government as Washington forewarned: The Government alleges that, with the help of political associates, he "spread lies that there had been outcome-determinative fraud in the election and that he had actually won," and "pursued unlawful means of discounting legitimate votes and subverting the election results," all because he "was determined to remain in power." Indictment ¶¶ 2, 4. In asserting absolute executive immunity, Defendant asks not for an opportunity to disprove those allegations, but for a categorical exemption from criminal liability because, in his view, "the indictment is based solely on

President Trump's official acts." Immunity Motion at 27–28. That obstruction to the execution of the laws would betray the public interest. "If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 312 (1947) (Frankfurter, J., concurring in the judgment).

For all these reasons, the constitutional consequences of federal criminal liability differ sharply from those of the civil liability at issue in *Fitzgerald*. Federal criminal liability will not impermissibly chill the decision-making of a dutiful Chief Executive or subject them to endless post-Presidency litigation. It will, however, uphold the vital constitutional values that *Fitzgerald* identified as warranting the exercise of jurisdiction: maintaining the separation of powers and vindicating "the public interest in an ongoing criminal prosecution." 457 U.S. at 753–54. Exempting former Presidents from the ordinary operation of the criminal justice system, on the other hand, would undermine the foundation of the rule of law that our first former President described: "Respect for its authority, compliance with its laws, [and] acquiescence in its measures"—"duties enjoined by the fundamental maxims of true liberty." Washington's Farewell Address at 13. Consequently, the constitutional structure of our government does not require absolute federal criminal immunity for former Presidents.

C. <u>History</u>

Nothing in American history justifies the absolute immunity Defendant seeks. As discussed above, *supra* Section III.A, there is no evidence that the Founders understood the Constitution to grant it, and since that

time the Supreme Court "has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law." *Imbler*, 424 U.S. at 429. Moreover, the notion that former Presidents cannot face federal criminal charges for acts they took in office is refuted by the "presuppositions of our political history." *Fitzgerald*, 457 U.S. at 745 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

Start with the Executive Branch itself. "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." *Nixon*, 418 U.S. at 703. The Executive's legal representatives—the Solicitor General and Office of Legal Counsel—have expressly and repeatedly concluded that a former President may "be subject to criminal process . . . after he leaves office or is removed therefrom through the impeachment process." OLC Immunity Memo at *12 (citing 1973 OLC Memo and 1973 SG Memo). Naturally, the Special Counsel's decision to bring this case also reflects that judgment, distinguishing the Department of Justice's position that former Presidents retain civil immunity. *See* Brief for the United States as Amicus Curiae at 3 n.1 (filed Mar. 2, 2023), *Blassingame v. Trump*, Nos. 22-5069, 22-7030, 22-7031 (D.C. Cir.). Even on its own, the Executive's longstanding and unwavering position on this issue weighs against this court unilaterally blocking a considered prosecution by conferring absolute immunity.[4]

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[4] Congress, the other political branch, has not spoken directly to this issue. But it has not exempted actions taken during the

Historical practice also indicates that a President's actions may later be criminally prosecuted. In the aftermath of Watergate, for example, President Ford granted former President Nixon "full, free, and absolute pardon . . . for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during" while in office. Gerald Ford, Presidential Statement at 7–8 (Sept. 8, 1974), *available at* https://perma.cc/2GNZ-QQ3D. In so doing, President Ford specifically noted the "serious allegations" that, without a pardon, would "hang like a sword over our former President's head" until he could "obtain a fair trial by jury." *Id*. at 3; *see id*. *at* 4–5 (expressing concern about Nixon's rights to a presumption of innocence and a speedy trial). And former President Nixon formally accepted that "full and absolute pardon for any charges which might be brought against me for actions taken during the time I was President of the United States," calling the pardon a "compassionate act." Richard Nixon, Statement by Former President Richard Nixon at 1 (Sept. 8, 1974), *available at* https://perma.cc/WV43-6E69. Both Ford's pardon and Nixon's acceptance arose from the desire to prevent the former President's potential criminal prosecution, and both

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Presidency from the criminal law, and "[u]nder the authority of Art. II, § 2," it "has vested in the Attorney General the power to conduct the criminal litigation of the United States Government" and "to appoint subordinate officers to assist him," which he has done "in th[is] particular matter[]" by appointing "a Special Prosecutor." *Nixon*, 418 U.S. at 694. The Government also notes the statements of individual members of Congress—including some who voted to acquit Defendant during his impeachment trial—anticipating that Defendant could later be criminally prosecuted for the conduct at issue. *See* Opp'n to Immunity Motion at 14–15.

specifically refer to that possibility—without which the pardon would have been largely unnecessary. Defendant's view of his own immunity thus stands at odds with that of his predecessors in the Oval Office.

Granting the immunity Defendant seeks would also break with longstanding legal precedent that all government officials—even those immune from civil claims—may be held to criminal account. In *Fitzgerald*, for instance, the Supreme Court analogized former President Nixon's civil immunity to the similar protections provided to judges and prosecutors. 457 U.S. at 745–48. Unlike most government officials, who only receive "qualified" civil immunity, prosecutors and judges have absolute civil immunity due to "the especially sensitive duties" of their office and the public interest in their "liberty to exercise their functions with independence and without fear of consequences." *Id.* at 745–46 (quotation omitted); *see, e.g., Imbler*, 424 U.S. at 431 (state prosecutors possess absolute civil immunity for prosecutions); *Stump v. Sparkman*, 435 U.S. 349, 359–60 (1978) (state judges possess absolute civil immunity for judicial acts). But notwithstanding their absolute civil immunity, prosecutors and judges are "subject to criminal prosecutions as are other citizens." *Dennis v. Sparks*, 449 U.S. 24, 31 (1980); *see Imbler*, 424 U.S. at 429. Thus, while in *Fitzgerald* the "careful analogy to the common law absolute immunity of judges and prosecutors" demonstrated history's support for the former President's civil immunity, *Vance*, 140 S. Ct. at 2426, here that same history compels the denial of a former President's criminal immunity.

Against the weight of that history, Defendant argues in essence that because no other former

Presidents have been criminally prosecuted, it would be unconstitutional to start now. Immunity Motion at 15–16. But while a former President's prosecution is unprecedented, so too are the allegations that a President committed the crimes with which Defendant is charged. *See infra* Section VI.B. The Supreme Court has never immunized Presidents—much less former Presidents—from judicial process merely because it was the first time that process had been necessary. *See, e.g., Vance*, 140 S. Ct. at 2424–25; *Clinton*, 520 U.S. at 692; *Nixon*, 418 U.S. at 703; *Burr*, 25 F. Cas. at 32. The court will not do so here.

In any event, Defendant's reasoning turns the relevant historical analysis on its head. In *Clinton*, the President likewise argued that the relative dearth of cases in which "sitting Presidents ha[d] been defendants in civil litigation involving their actions prior to taking office" meant that the Constitution afforded him temporary immunity for such claims. 520 U.S. at 692; *see* Brief for the Petitioner, 1996 WL 448096, at *17–18, *Clinton v. Jones*, No. 95-1853 (U.S.). The Court found instead that the dearth of similar cases meant that there was no "basis of precedent" for the immunity that President Clinton sought—and in fact showed that there was little risk of such litigation impeding the Presidency going forward. *Clinton*, 520 U.S. at 692, 702. In other words, a defendant cannot claim that history supports their immunity by pointing to the fact that their immunity has never been asserted. Here, as in *Clinton*, that absence of precedent negates rather than validates Defendant's argument that history establishes his immunity from criminal prosecution.

* * *

For these reasons, the court cannot conclude that our Constitution cloaks former Presidents with absolute immunity for any federal crimes they committed while in office. Our nation's "historic commitment to the rule of law" is "nowhere more profoundly manifest than in our view that 'the twofold aim of criminal justice is that guilt shall not escape or innocence suffer.'" *Nixon*, 418 U.S. at 708–09 (quoting *Berger*, 295 U.S. at 88) (formatting modified). Nothing in the Constitution's text or allocation of government powers requires exempting former Presidents from that solemn process. And neither the People who adopted the Constitution nor those who have safeguarded it across generations have ever understood it to do so. Defendant's four-year service as Commander in Chief did not bestow on him the divine right of kings to evade the criminal accountability that governs his fellow citizens. "No man in this country," not even the former President, "is so high that he is above the law." *Lee*, 106 U.S. at 220.

Consistent with its duty to not "decide questions of a constitutional nature unless absolutely necessary to a decision," *Clinton*, 520 U.S. at 690 & n.11 (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905)), the court emphasizes the limits of its holding here. It does not decide whether former Presidents retain absolute criminal immunity from non-federal prosecutions, or whether sitting Presidents are entitled to greater immunity than former ones. Similarly, the court expresses no opinion on the additional constitutional questions attendant to Defendant's assertion that former Presidents retain absolute criminal immunity for acts "within the outer perimeter of the President's official" responsibility. Immunity Motion at 21

(formatting modified). Even if the court were to accept that assertion, it could not grant Defendant immunity here without resolving several separate and disputed constitutional questions of first impression, including: whether the President's duty to "take Care that the Laws be faithfully executed" includes within its "outer perimeter" at least five different forms of indicted conduct;[5] whether inquiring into the President's purpose for undertaking each form of that allegedly criminal conduct is constitutionally permissible in an immunity analysis, and whether any Presidential conduct "intertwined" with otherwise constitutionally immune actions also receives criminal immunity. *See id.* at 21–45. Because it concludes that former Presidents do not possess absolute federal criminal immunity for any acts committed while in office, however, the court need not reach those additional constitutional issues, and it expresses no opinion on them.

IV. FIRST AMENDMENT

In his Constitutional Motion, Defendant first argues that the Indictment should be dismissed because it criminalizes his speech and therefore violates the First Amendment. But it is well

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[5] As another court in this district observed in a decision regarding Defendant's civil immunity, "[t]his is not an easy issue. It is one that implicates fundamental norms of separation of powers and calls on the court to assess the limits of a President's functions. And, historical examples to serve as guideposts are few." *Thompson v. Trump*, 590 F. Supp. 3d 46, 74 (D.D.C. 2022); *see id.* at 81–84 (performing that constitutional analysis). The D.C. Circuit recently affirmed that district court's decision with an extensive analysis of just one form of conduct—"speech on matters of public concern." *Blassingame v. Trump*, Nos. 22-5069, 22-7030, 22-7031, slip op. at 23–42 (D.C. Cir. Dec. 1, 2023).

established that the First Amendment does not protect speech that is used as an instrument of a crime, and consequently the Indictment—which charges Defendant with, among other things, making statements in furtherance of a crime—does not violate Defendant's First Amendment rights.

A. The First Amendment and criminal prosecutions

The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Generally, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. Am. Civ. Liberties Union*, 535 U.S. 564, 573 (2002)). In restricting the government's power to control speech, the First Amendment "embodies 'our profound national commitment to the free exchange of ideas.'" *Ashcroft*, 535 U.S. at 573 (citation omitted).

The right to freedom of speech is "not absolute," however. *Id.* It is fundamental First Amendment jurisprudence that prohibiting and punishing speech "integral to criminal conduct" does not "raise any Constitutional problem." *Stevens*, 559 U.S. at 468–69 (citation omitted); *accord Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498–502 (1949). "Many long established" criminal laws permissibly "criminalize speech . . . that is intended to induce or commence illegal activities," *United States v. Williams*, 553 U.S. 285, 298 (2008), such as fraud, bribery, perjury, extortion, threats, incitement, solicitation, and blackmail, *see, e.g., Stevens*, 559 U.S. at 468–69 (fraud); *Williams*, 553 U.S. at 298 (incitement, solicitation); *Citizens United v. Fed. Election Comm'n*,

558 U.S. 310, 356 (2010) (bribery); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 244 (4th Cir. 1997) (extortion, threats, blackmail, perjury). Prosecutions for conspiring, directing, and aiding and abetting do not run afoul of the Constitution when those offenses are "carried out through speech." *Nat'l Org. for Women v. Operation Rescue*, 37 F.3d 646, 655–56 (D.C. Cir. 1994) (directing and aiding and abetting); *see Williams*, 553 U.S. at 298 (conspiring).

B. The Indictment does not violate the First Amendment

The Indictment alleges that Defendant used specific statements as instruments of the criminal offenses with which he is charged: conspiring to fraudulently obstruct the federal function for collecting, counting, and certifying the results of the Presidential election, in violation of 18 U.S.C. § 371 (Count I); corruptly obstructing and conspiring to obstruct Congress's certification of the election results, in violation of 18 U.S.C. §§ 1512(c)(2) and (k) (Counts II and III); and conspiring to deprive citizens of their constitutional right to have their votes counted, in violation of 18 U.S.C § 241 (Count IV). *See* Indictment ¶¶ 5–130.

That Defendant's alleged criminal conduct involved speech does not render the Indictment unconstitutional. The Indictment notes that "Defendant had a right, like every American, to speak publicly about the election and even to claim, falsely, that there had been outcome-determinative fraud during the election and that he had won." *Id.* ¶ 3. And it enumerates Defendant's specific statements only to support the allegations that Defendant joined conspiracies and attempted to obstruct the election certification, such as the allegations that Defendant

knowingly made false claims about the election results, *id*. ¶¶ 11–12, and deceived state officials to subvert the election results, *id*. ¶ 13–52. *See, e.g., id*. ¶¶ 12, 19, 22, 31–35, 37, 41, 46, 50, 52 (referencing Defendant's statements). The Indictment therefore properly alleges Defendant's statements were made in furtherance of a criminal scheme.

Defendant argues that the Indictment violates the First Amendment for three primary reasons: (1) the government may not prohibit Defendant's core political speech on matters of public concern, Constitutional Motion at 4–11; (2) "First Amendment protection . . . extends to statements advocating the government to act," *id*. at 12–14 (formatting modified); and (3) Defendant reasonably believed that the 2020 Presidential Election was stolen, *id*. at 15–17.

1. Core political speech on matters of public concern

Defendant first claims that his statements disputing the outcome of the 2020 election is "core political speech" that addresses a "matter[] of public concern." *Id*. at 8–10. Even assuming that is true, "core political speech" addressing "matters of public concern" is not "immunized from prosecution" if it is used to further criminal activity. *United States v. Rahman*, 189 F.3d 88, 117 (2d Cir. 1999); *see Stevens*, 559 U.S. at 468–69. That is the case even though Defendant was the President at the time. *See Blassingame v. Trump*, Nos. 22-5069, 22-7030, 22-7031, slip op. at 50 (D.C. Cir. Dec. 1, 2023) (Defendant is not entitled to immunity when he "engages in speech" that "removes him[] from the First Amendment's protections."). As the D.C. Circuit has recognized, "an immunity for all presidential speech

on matters of public concern …. is 'unsupported by precedent.'" *Id.* at 27 (quoting *Clinton*, 520 U.S. at 695).

In support of his argument, Defendant first invokes various Justices' opinions in *United States v. Alvarez*, 567 U.S. 709 (2012). Constitutional Motion at 4–7. There was no majority opinion in *Alvarez*; a majority of the Justices agreed only that the Stolen Valor Act, which prohibits an individual from falsely representing that they have received "any decoration or medal authorized by Congress for the Armed Forces of the United States," violated the First Amendment. 567 U.S. at 716, 729–30 (plurality opinion) (Kennedy, J., joined by Roberts. C.J., Ginsburg, J., and Sotomayor, J.); *id.* at 730 (Breyer, J. concurring in the judgment, joined by Kagan, J.). One theme common to both the plurality and concurring opinions, however, was the concern that the Stolen Valor Act prohibited only false statements and *only because of their falsity*. *See id.* at 717–22 (plurality opinion); *id.* at 732 (Breyer, J. concurring). Indeed, each opinion reiterated that laws "implicat[ing] fraud or speech integral to criminal conduct" are constitutional. *Id.* at 721 (plurality opinion); *accord id.* at 734–36 (Breyer, J., concurring in the judgment); *id.* at 747 (Alito, J., dissenting). Because it confirmed that speech involved in the commission of a crime was not protected by the First Amendment, *Alvarez* did not undermine settled precedent allowing the prosecution of speech in furtherance of criminal activity.

Second, Defendant contends that "attempts to prohibit or criminalize claims on political disputes" constitute viewpoint discrimination. Constitutional Motion at 9–10. But Defendant is not being prosecuted for his "view" on a political dispute; he is

being prosecuted for acts constituting criminal conspiracy and obstruction of the electoral process. *Supra* Section I. And any political motives Defendant may have had in doing so do not insulate his conduct from prosecution. *E.g., Rahman*, 189 F.3d at 116–17 (mixed motives do not insulate speech from prosecution); *see* Gov.'s Omnibus Opp'n to Def.'s Motions to Dismiss the Indictment on Statutory and Constitutional Grounds, ECF No. 139 at 33 (Opp'n to Constitutional Motion) (collecting other Circuit cases). The Indictment does not unconstitutionally discriminate against Defendant based on viewpoint.

Third, Defendant argues that even if a higher level of scrutiny does not apply to the Indictment, it nonetheless is invalid "under any level of scrutiny" because it is "tailored to violate free-speech rights." Constitutional Motion at 11. Here, however, there is no level of scrutiny that applies, because speech in furtherance of criminal conduct does not receive *any* First Amendment protection. *E.g., Stevens*, 559 U.S. at 468–69. Moreover, Defendant cites no support for his argument that the Indictment is "tailored to *violate* free-speech rights," nor does he explain how the Indictment is so tailored. *See* Constitutional Motion at 11 (emphasis added).

Finally, Defendant argues that the Indictment violates the First Amendment because "*all* the charged conduct constitutes First Amendment protected speech." Def.'s Reply in Support of Motion to Dismiss Based on Constitutional Grounds, ECF No. 162 at 7–8 ("Constitutional Reply") (emphasis in original). He contends that to qualify as speech in furtherance of criminal conduct, "the speech in question must 'be integral to' some criminal 'conduct' that *is not itself a form of First Amendment-protected*

speech or expression." *Id*. (emphasis added). But again, the Indictment does not need to list other kinds of criminal conduct in addition to speech to comply with the First Amendment; the crimes Defendant is charged with violating may be carried out through speech alone. *See Nat'l Org. for Women*, 37 F.3d at 656; *supra* Section IV.A.

2. Statements advocating government action

Defendant next claims the First Amendment protects "statements advocating the government to act." Constitutional Motion at 12–14 (formatting modified). He first contends the Petition Clause of the First Amendment provides an absolute right to make statements encouraging the government to act in a public forum, citing *McDonald v. Smith*, 472 U.S. 479 (1985). Constitutional Motion at 12–13. The Petition Clause provides that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. The Clause protects individuals' ability to "'communicate their will' through direct petitions to the legislature and government officials." *McDonald*, 472 U.S. at 482 (quoting 1 *Annals of Congress* 738 (1789) (James Madison)). In *McDonald*, however, the Supreme Court concluded that the Petition Clause did *not* immunize a person from a libel suit based on letters the individual had sent to the President. *Id*. at 480–81; *see also* Opp'n to Constitutional Motion at 34. The Court explained that the Petition Clause does not have "special First Amendment status," so "there is no sound basis for granting greater constitutional protection" under the Petition Clause "than other First Amendment expressions." *McDonald*, 472 U.S. at 484–85. Defendant's reliance on the Clause and its interpretation in *McDonald* is therefore unavailing,

as the Petition Clause does not prohibit prosecuting Defendant's speech any more than the Speech Clause does. The Petition Clause does not insulate speech from prosecution merely because that speech also petitions the government.

Defendant also invokes *McDonnell v. United States*, 579 U.S. 550 (2016), to argue that allowing this prosecution would risk criminalizing statements once thought to be false that turned out to be true, such as statements made early in the COVID-19 pandemic that masks do not stop the transmission of the virus. Constitutional Motion at 13–14. Not so. First, *McDonnell* did not involve the First Amendment but rather the proper interpretation of "official act" under the federal bribery statute, 18 U.S.C. § 201(b)(2). *McDonell*, 579 U.S. at 566; *see* Opp'n to Constitutional Motion at 34 n.14. And neither the Indictment nor the federal statutes under which Defendant is charged involve an "official act." Second, Defendant is not being prosecuted simply for making false statements, *see supra* at 33–34, but rather for knowingly making false statements in furtherance of a criminal conspiracy and obstructing the electoral process. Consequently, there is no danger of a slippery slope in which inadvertent false statements alone are alleged to be the basis for criminal prosecution.

In his Reply brief, Defendant also raises overbreadth, arguing that under the Government's interpretation, the underlying statutes charged in the Indictment are unconstitutional because they "criminalize a wide range of perfectly ordinary acts of public speech and petitioning the government." Constitutional Reply at 9–10. Assuming Defendant's overbreadth challenge was properly raised for the first time in his Reply brief, the statutes are not overbroad

under the Government's view. As an initial matter, Defendant's actions are not entitled to First Amendment protection as "perfectly ordinary acts of public speech and petitioning the government." *Supra* Section IV.B.1–2; *infra* Section IV.B.3. Moreover, Defendant fails to identify any protected acts or speech that the statutes might render impermissible under the Government's interpretation. *See, e.g.*, *United States v. Hansen*, 599 U.S. 762, 769–70 (2023) (A litigant must "demonstrate[] that the statute 'prohibits a substantial amount of protected speech' relative to its 'plainly legitimate sweep'" to succeed in overbreadth challenge (citation omitted)).

3. Defendant's statements on the 2020 Presidential Election

Finally, Defendant claims the First Amendment does not permit the government to prosecute him for his reasonable belief that the 2020 Presidential Election was stolen. Constitutional Motion at 15–17. He argues that the truth or falsity of his belief is not "easily verifiable" and there is "abundant public evidence providing a reasonable basis" for his view. *Id.* at 15–16. He contends that he is "entitled to mistrust the word of . . . establishment-based government officials and draw [his] own inferences from the facts." *Id.* at 17. At this stage, however, the court must take the allegations in the Indictment as true, *supra* Section II, and the Indictment alleges that Defendant made statements that he knew were false, *e.g.*, Indictment ¶¶ 11–12; *see also* Opp'n to Constitutional Motion at 26–27. While Defendant challenges that allegation in his Motion, and may do so at trial, his claim that his belief was reasonable does not implicate the First Amendment. If the Government cannot prove beyond a reasonable doubt

at trial that Defendant knowingly made false statements, he will not be convicted; that would not mean the Indictment violated the First Amendment.

V. DOUBLE JEOPARDY

Defendant's Constitutional Motion next posits that the prosecution violates double jeopardy because Defendant was tried—and acquitted—in earlier impeachment proceedings arising out of the same course of conduct. Constitutional Motion at 18–24. But neither traditional double jeopardy principles nor the Impeachment Judgment Clause provide that a prosecution following impeachment acquittal violates double jeopardy.

A. Double Jeopardy Clause

The Fifth Amendment provides that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. To "be twice put in jeopardy of life or limb" means to face the possibility of "multiple criminal punishments for the same offense." *Hudson v. United States*, 522 U.S. 93, 99 (citation omitted) (emphasis in original). A purportedly civil penalty only counts in the double jeopardy context if "the statutory scheme was so punitive in either purpose or effect . . . as to 'transform'" it into a criminal penalty. *Id.* (citation omitted).

As long as separate prosecutions charge an individual with violating different laws, the prosecutions are considered separate "offenses" under the Double Jeopardy Clause and the second prosecution passes constitutional muster. *Denezpi v. United States*, 596 U.S. 591, 597–98 (2022). When the same "act or transaction" violates two distinct provisions of the same statute, there are distinct

offenses only if "each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). In contexts involving different sovereigns—such as the federal government and a state government—a person may be tried for violating laws that "have identical elements and could not be separately prosecuted if enacted by a single sovereign." *Denezpi*, 596 U.S. at 597–98.

The Indictment here does not violate double jeopardy principles. First, impeachment threatens only "removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States," U.S. Const. art. I, § 3, cl. 7, neither of which is a criminal penalty. *See supra* at 9. Nor does Defendant argue that they are civil penalties that should be construed as criminal penalties. *See* Constitutional Motion at 23–24. Second, the impeachment proceedings charged Defendant with "Incitement of Insurrection," which is not charged in the Indictment. *See* Opp'n to Constitutional Motion at 60–62 (citing H.R. Res. 24, 117th Cong. (Jan. 11, 2021)). Although there are few decisions interpreting the analogous federal statute that prohibits inciting "any . . . insurrection against the authority of the United States or the laws thereof," 18 U.S.C. § 2383, it is well-established that "incitement" typically means "advocacy . . . directed to inciting or producing imminent lawless action" that is "likely to incite or produce such action," *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). None of the statutes under which Defendant is charged require the Government to prove incitement. *See* 18 U.S.C. § 371; *id.* §§ 1512(c)(2), (k); *id.* § 241; *accord* Indictment ¶¶ 6, 126, 128, 130. The impeachment proceedings and this

prosecution therefore did not "twice put" Defendant "in jeopardy of life or limb" for the "same offense."

Defendant also contends his prosecution violates double jeopardy principles because the distinct branches of government are part of one single sovereign. Constitutional Motion at 24. But even assuming that is true, Defendant does not argue that impeachment carries a criminal sanction or that the impeachment proceedings were based on the same offense as charged in the Indictment. *See id*. at 23–24. Instead, he argues that different double jeopardy principles would apply to prosecutions following impeachments, referencing only the Impeachment Judgment Clause for support. Constitutional Reply at 18–20. But, as discussed below, the Impeachment Judgment Clause provides only that prosecutions following convictions at impeachment are constitutionally permissible; it does not create special double jeopardy principles. *See* U.S. Const. art. I, § 3, cl. 7; *infra* Section V.B. Consequently, the Indictment does not violate the Double Jeopardy Clause.

B. Impeachment Judgment Clause

The Impeachment Judgment Clause provides that "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: 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. As explained above, the first part of the Clause limits the remedies available in impeachment, and the second part provides that even if a person is convicted in impeachment proceedings, they may still be subject to criminal prosecution. *See supra* at 8–10. As the Office

of Legal Counsel noted, the "second part makes clear that the restriction on sanctions in the first part was not a prohibition on further punishments; rather, those punishments would still be available but simply not to the legislature." OLC Double Jeopardy Memo at *10.

Defendant contends the Impeachment Judgment Clause contains a negative implication: if a person is not convicted in impeachment proceedings, they may *not* be prosecuted. Constitutional Motion at 18–23; Constitutional Reply at 10–11. In statutory interpretation, the *expressio unius* canon, which provides that "expressing one item of an associated group or series excludes another left unmentioned," does not apply unless "circumstances support a sensible inference that the term left out must have been meant to be excluded." *NLRB v. SW General, Inc.*, 580 U.S. 288, 302 (2017) (citations omitted). Because Defendant's reading is not supported by the structure of the Constitution, the historical context of the impeachment clauses, or prior constitutional precedents, *expressio unius* does not apply. *Accord Thompson v. Trump*, 590 F. Supp. 3d 46, 86–87 (D.D.C. 2022). The Impeachment Judgment Clause does not provide that acquittal by the Senate during impeachment proceedings shields a President from criminal prosecution after he leaves office.

1. Structure

Structural considerations support reading the Impeachment Judgment Clause as the plain language suggests. First, as the Government notes, impeachment and prosecution serve distinct goals within the separation of powers. *See* Opp'n to Constitutional Motion at 52–53. Impeachment "is designed to enable Congress to protect the nation

against officers who have demonstrated that they are unfit to carry out important public responsibilities," whereas prosecution is designed to "penalize individuals for their criminal misdeeds." OLC Double Jeopardy Memo at *13. Impeachment proceedings provide far fewer procedural safeguards than do prosecutions, *see id.*, and accordingly, Congress may not dispense criminal penalties in impeachment proceedings, *supra* Section V.A. Impeachment is not a substitute for prosecution.

Second, the Senate may acquit in impeachment proceedings even when it finds that an official committed the acts alleged. For example, the Senate may acquit because it believes the acts committed do not amount to "high Crimes and Misdemeanors," U.S. Const. art. II, § 4; because the Senate believes it lacks authority to try the official; or for partisan reasons. OLC Double Jeopardy Memo at *14–15. Indeed, the Framers anticipated that impeachments might spark partisan division. *See* The Federalist No. 65, at 330–31 (Alexander Hamilton); Letter from Edmund Pendleton to James Madison, Oct. 8, 1787, 10 *The Documentary History of the Ratification of the Constitution* 1773 (1976); 10 *The Papers of James Madison* 223 (Rutland et al. ed., 1977); *accord* OLC Double Jeopardy Memo at *15. Acquittal on impeachment does not establish the defendant's innocence.

Defendant contends that impeachment serves to protect officials from political attacks by their enemies, and allowing prosecution following impeachment acquittal would undermine that protection. Constitutional Reply at 15–18. But politics are likely to play even larger a role in impeachments than in prosecutions, given that impeachments are

conducted by elected officials politically accountable to their constituents, whereas prosecutions are conducted by appointed officials, most of whom may not be removed without cause, *see Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492–93 (2010) (explaining for-cause removal). And former officials like Defendant, rather than current officials, are also less likely to be politically attacked, because they no longer hold the power and authority of political office.

2. Historical context

Defendant claims that his interpretation of the Impeachment Judgment Clause reflects the original public meaning of the impeachment clauses. Constitutional Motion at 20–21; Constitutional Reply at 12–15. Considerable historical research undermines that contention. *See* OLC Double Jeopardy Memo at *7–12 ("We are unaware of any evidence suggesting that the framers and ratifiers of the Constitution chose the phrase 'the party convicted' with a negative implication in mind."); *accord Thompson*, 590 F. Supp. 3d at 87. Most notably, the Founders repeatedly acknowledged that impeachment acquittals would not bar subsequent prosecutions. For example, James Wilson, who participated in the Constitutional Convention, observed that officials who "may not be convicted on impeachment . . . may be tried by their country." 2 *The Documentary History of the Ratification of the Constitution* 492. Edward Pendleton, who was President of the Virginia Ratifying Convention, similarly observed that "an Acquital would not bar," a "resort to the Courts of Justice," Letter from Edmund Pendleton to James Madison, Oct. 8, 1787, 10 *The Documentary History of the Ratification of the*

Constitution 1773, a conclusion that James Madison called "extremely well founded," 10 *The Papers of James Madison* 223. Justice Story too described that, following impeachment, "a second trial for the same offence could be had, either after an acquittal, or a conviction in the court of impeachments." 2 *Story's Commentaries* § 780.

Founding-era officials similarly acknowledged that an acquittal at impeachment proceedings would not bar a subsequent prosecution. For example, during the first federal impeachment trial, Representative Samuel Dana contrasted impeachment proceedings with criminal trials, stating that impeachment had "no conne[ct]ion with punishment or crime, as, whether a person tried under an impeachment be found guilty or acquitted, he is still liable to a prosecution at common law." 9 *Annals of Congress* 2475 (1798). None of the sources Defendant cites refute that conclusion. See Constitutional Motion at 20–21.

3. Prior precedent

Defendant's additional arguments invoking past constitutional precedents are similarly unavailing. He first cites Justice Alito's dissent in *Vance*. Constitutional Motion at 19–20. In *Vance*, the Supreme Court held that a sitting President is not immune from state criminal subpoenas, nor does a heightened standard apply to such requests. 140 S. Ct. at 2431. In so holding, the majority opinion reiterated that "no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding." *Id*. Justice Alito's dissent, moreover, noted that under the Impeachment Judgement Clause, "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." *Id.* at 2444 (Alito, J., dissenting); *see* Constitutional Motion at 19. All Justice Alito's dissent observed is that, temporally, any prosecution must follow the judgment on impeachment; no official shall be subject to simultaneous impeachment proceedings and criminal prosecution. The dissent does not support the view that if impeachment proceedings end in acquittal, subsequent prosecution violates double jeopardy.

Defendant also cites *Fitzgerald* for the proposition that the threat of impeachment alone is the proper remedy against a President for any "official misfeasance." Constitutional Motion at 22. But as already explained, *Fitzgerald* is meaningfully distinguishable; it addressed immunity from civil suit, and all nine Justices took care to emphasize that their reasoning did not extend to the criminal context. *See supra* Section III.B.1.

In sum, neither the Double Jeopardy Clause nor the Impeachment Judgment Clause prevent Defendant, who while President was acquitted in impeachment proceedings for incitement, from being prosecuted after leaving office for different offenses.

VI. DUE PROCESS

Finally, Defendant contends that the Indictment violates the Due Process Clause because he lacked fair notice that his conduct was unlawful. Constitutional Motion at 25–31.

A. Due process principles

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S.

Const. amend. V. To comply with due process, a law must give "fair warning" of the prohibited conduct. *United States v. Lanier*, 520 U.S. 259, 265 (1997) (citation omitted). A law fails to give fair warning if the text of a statute is so unclear that it requires the Judicial and Executive Branches to "define what conduct is sanctionable and what is not," *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018); *see Lanier*, 520 U.S. at 266 (citation omitted), or a judge construes the statute in a manner that is "clearly at variance with the statutory language," *Bouie v. City of Columbia*, 378 U.S. 347, 356 (1964); *see Rogers v. Tennessee*, 532 U.S. 451, 457 (2001); *see also Lanier*, 520 U.S. at 266.

For instance, in 2015, the Supreme Court concluded that the residual clause of the Armed Career Criminal Act violated due process because it was so vague—and difficult to administer—that defendants lacked notice of how it would be applied in any given case. *Johnson v. United States*, 576 U.S. 591, 597 (2015). The Court explained that the residual clause required judges to imagine an "ordinary case" involving the crime with which the defendant was charged, and compare the defendant's actions to that "ordinary case." *Id*. at 597, 599. It further emphasized that its "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm[ed] its hopeless indeterminacy," *id*. at 598, noting that the clause had caused "numerous splits among the lower federal courts," *id*. at 601 (citation omitted).

A statute does not fail to give fair warning just "because it 'does not mean the same thing to all people, all the time, everywhere.'" *United States v. Bronstein*, 849 F.3d 1101, 1107 (D.C. Cir. 2017) (citation omitted). "Since words, by their nature, are

imprecise instruments," laws "may have gray areas at the margins" without violating due process. *United States v. Barnes*, 295 F.3d 1354, 1366 (D.C. Cir. 2002). Indeed, statutes are rarely found unconstitutional because their text fails to give fair warning. *See, e.g., Bronstein*, 849 F.3d at 1107 (statute upheld); *Barnes*, 259 F.3d at 1366 (same); *Woodhull Freedom Found. v. United States*, 72 F.4th 1286, 1303–05 (D.C. Cir. 2023) (same); *Kincaid v. Gov't of D.C.*, 854 F.3d 721, 728–30 (D.C. Cir. 2017) (same); *Agnew v. Gov't of D.C.*, 920 F.3d 49, 55–61 (D.C. Cir. 2019) (same).

Applying a novel judicial construction of a statute may also fail to give fair warning if it "unexpectedly broadens" the statute's reach and applies that expanded reach "retroactively." *Bouie*, 378 U.S. at 353–57; *see Rogers*, 532 U.S. at 457; *Reed v. Goertz*, 143 S. Ct. 955, 960–61 (2023). In *Bouie*, for example, defendants were convicted of violating a state law prohibiting "entry upon the lands of another . . . after notice from the other . . . prohibiting such entry" after they remained on premises after being asked to leave, even though they did not re-enter the premises. 378 U.S. at 355. The Supreme Court held that the state supreme court's construction of the statute failed to give the defendants fair notice because it was "clearly at variance with the statutory language" and had "not the slightest support in prior [state] decisions." *Id.* at 356.

B. The Indictment does not violate due process

Defendant had fair notice that his conduct might be unlawful. None of the criminal laws he is accused of violating—18 U.S.C. § 371; *id.* § 1512(k); *id.* § 1512(c)(2); and *id.* § 241—require the Executive or Judicial Branch to "guess" at the prohibited conduct, *Lanier*, 520 U.S. at 266. Nor does finding that the

Indictment complies with due process require the court to create a novel judicial construction of any statute.

Defendant notes that the "principle of fair notice has special force" in the First Amendment Context. Constitutional Motion at 26–27. While that may be true, even "special force" does not place Defendant's alleged conduct "outside the plain language of the charged statutes" as he alleges. *See id.* at 27. First, his argument does not contrast the allegations in the Indictment with the plain language of the statutes, but instead attempts to recast the factual allegations in the Indictment itself as no more than routine efforts to challenge an election. *See id.* at 31 (claiming that "post-election challenges" like Defendant's "had been performed in 1800, 1824, 1876, and 1960 . . . without any suggestion [it was] criminal"). But again, at this stage, the court must take the allegations in the Indictment as true. *Supra* Section II, IV.B.3. The fact that Defendant disputes the allegations in the Indictment do not render them unconstitutional. Second, the meaning of statutory terms "need not be immediately obvious to an average person; indeed, 'even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.'" *Agnew*, 920 F.3d at 57 (citation omitted). And due process does not entitle Defendant to advance warning that his precise conduct is unlawful, so long as the law plainly forbids it. *See Lanier*, 520 U.S. at 271; *cf. United States v. Int'l Mins. & Chem. Corp.*, 402 U.S. 558, 563 (1971) ("ignorance of the law is no defense").

Defendant also claims he lacked fair notice because there is a "long history" of government

officials "publicly claiming that election results were tainted by fraud" or questioning election results, yet he is "the first person to face criminal charges for such core political behavior." Constitutional Motion at 25; *see id.* at 27–30. But there is also a long history of prosecutions for interfering with the outcome of elections; that history provided Defendant with notice that his conduct could be prosecuted. *See* Opp'n to Constitutional Motion at 39–40 (citing six examples of 18 U.S.C. § 241 prosecutions). Indeed, the Supreme Court has addressed more than one case in which officials were prosecuted for interfering with or discarding election ballots. *United States v. Mosley*, 238 U.S. 383, 385 (1915); *United States v. Saylor*, 322 U.S. 385, 386 (1944).

In addition, none of the contested elections Defendant invokes is analogous to this case. *See* Opp'n to Constitutional Motion at 40–47 (detailing the history of each election). As noted above, Defendant is not being prosecuted for publicly contesting the results of the election; he is being prosecuted for knowingly making false statements in furtherance of a criminal conspiracy and for obstruction of election certification proceedings. And in none of these earlier circumstances was there any allegation that any official engaged in criminal conduct to obstruct the electoral process. For instance, following the 2004 Presidential election, Representative Stephanie Tubbs Jones raised an objection to Ohio's electoral votes at the joint session; Senator Boxer signed the objection. 151 Cong. Rec. 199 (Jan. 6, 2005). As Representative Jones explained in a separate session, that objection was to allow "a necessary, timely, and appropriate opportunity to review and remedy . . . the right to vote." *Id.* Ohio's electoral votes were then

counted for President Bush. Defendant points to no allegation that Representative Jones' objection was in furtherance of a criminal conspiracy or designed to obstruct the electoral process.

Moreover, even if there were an analogous circumstance in which an official had escaped prosecution, the mere absence of prior prosecution in a similar circumstance would not necessarily mean that Defendant's conduct was lawful or that his prosecution lacks due process. The "exclusive authority and absolute discretion to decide whether to prosecute a case"—within bounds, *supra* at 19–20—is a cornerstone of the Executive Branch. *Nixon*, 418 U.S. at 693 (citation omitted).

Finally, Defendant argues that, for the Indictment to comply with due process, the prosecution bears the burden to "provide examples where similar conduct was found criminal." Constitutional Reply at 21. Under that theory, novel criminal acts would never be prosecuted. The Constitution does not so constrain the Executive Branch.

VII. CONCLUSION

For the foregoing reasons, the court will DENY Defendant's Motion to Dismiss Indictment Based on Presidential Immunity, ECF No. 74, and Motion to Dismiss the Indictment Based on Constitutional Grounds, ECF No. 113. A corresponding Order will accompany this Memorandum Opinion.

Date: December 1, 2023

/s/ *Tanya S. Chutkan*
TANYA S. CHUTKAN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Action No. 23-257 (TSC)

UNITED STATES OF AMERICA,

v.

DONALD J. TRUMP,

Defendant.

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, ECF No. 171, Defendant's Motion to Dismiss Based on Presidential Immunity, ECF No. 74, is hereby DENIED; and Defendant's Motion to Dismiss Based on Constitutional Grounds, ECF No. 113, is hereby DENIED.

Date: December 1, 2023

/s/ Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-3228

UNITED STATES OF AMERICA,

Appellee,

v.

DONALD J. TRUMP,

Appellant.

Tuesday, January 9, 2024

Washington, D.C.

[Excerpts from Transcript of Proceedings]

* * *

[3:5-25]

JUDGE HENDERSON: Mr. Sauer, good morning. Before you get started, can I just get a couple of things on the record? Our jurisdiction was challenged by an amicus, but from your reply brief, you are not questioning our collateral order jurisdiction.

ORAL ARGUMENT OF D. JOHN SAUER, ESQ.

ON BEHALF OF THE APPELLANT

MR. SAUER: In fact, we defend the collateral order jurisdiction, that's correct, Your Honor.

JUDGE HENDERSON: Right. And then, also, you have either abandoned or not made the Fifth Amendment double jeopardy argument before us.

MR. SAUER: We have framed the double jeopardy argument as arising principally from the Impeachment Judgment Clause. So we haven't argued that if you go straight to the double jeopardy clause, that that alone would result in reversal, focusing on the Impeachment Judgment Clause. Now, that incorporates principles of double jeopardy --

JUDGE HENDERSON: Right.

MR. SAUER: -- but we haven't said a

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straightforward, directly under the --

JUDGE HENDERSON: Right.

MR. SAUER: -- double jeopardy clause in this Court at this time.

JUDGE HENDERSON: Go ahead, then.

JUDGE CHILDS: Well, before that occurs, then, I do want to speak to you a little bit more about jurisdiction, because we still have to satisfy ourselves that we have the jurisdiction. So even though you believe that there's interlocutory jurisdiction with respect to the collateral order doctrine, how do you place that in line with *Midland Asphalt* case, which specifically says, in a criminal case, your jurisdiction needs to stem from the Constitution or be explicit, as well in statutory law?

MR. SAUER: Yes. We have three responses to that, if I may, Your Honor. One is, of course, that if you look at the language of *Midland Asphalt*, what Justice Scalia is discussing in that case is, particularly, right the -- a situation where the right is one, the legal and practical value of which would be destroyed if it were not violated before trial, and these claims of absolute immunity fall right in the heartland of that

description of that right. That's been reinforced by the Supreme Court --

JUDGE CHILDS: But how do you deal with explicitly --

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MR. SAUER: Yes.

JUDGE CHILDS: -- stating that, because we don't have an explicit communication here with respect to anything in the Constitution or statute?

MR. SAUER: Yes. I respectfully disagree with that. The doctrine of presidential immunity arises directly from Article II, Section 1, in the Executive Vesting Clause. It's reinforced by the plain language of the Impeachment Judgment Clause, which specifically refers to trial.

Remember, what *Midland Asphalt* is talking about is situations where the right not to be tried is at stake, and it distinguishes that from the right -- the remedy for which is a dismissal of an indictment. So when you're talking about the right not to be tried, we have the clearest and most explicit reference to trial of any of the clauses in which the Supreme Court has found interlocutory jurisdiction.

JUDGE CHILDS: But there have been other circuits that have indicated, on the issue of immunity, *Midland Asphalt* still applies.

MR. SAUER: Yes, not presidential immunity with respect to this Court's --

JUDGE CHILDS: That's what you're making your distinction?

MR. SAUER: Right, and -- well, what I would say

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is, this Court's decision in *Cisneros* explicitly says -- you know, right there in it, it says, most separation of powers claims may not be subject to interlocutory review but there are some that may, and then it goes on to say, presidential immunity arising from the separation of powers, citing *Clinton against Jones*.

So *Cisneros*, I think, expressly contemplates that there'd be interlocutory jurisdiction in this sort of claim, and that's further reinforced by the Court's subsequent decisions in *Rose* and *Rostenkowski*, situations where the court said look, there's a speech and debate claim and there's also another claim that's -- it isn't derived directly from the Constitution, but it's closely akin or analogous to --

JUDGE CHILDS: But let me talk --

MR. SAUER: -- such a claim.

JUDGE CHILDS: -- again about explicit, because in the double jeopardy trial scenario, you have twice put in jeopardy; so you cannot be tried again in that regard. Then in the speech and debate, it says, shall not be questioned; so the language was explicit. You're not giving me anything that says explicitly in the references that you cite.

MR. SAUER: I have two responses to that. One is the plain language of the Impeachment Judgment Clause, which says that only the party convicted shall be subject to

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indictment, trial, judgment, and punishment according to law. So right there --

JUDGE CHILDS: But that's if you take the negative inference, correct?

MR. SAUER: That's (indiscernible). The plain language supports (indiscernible) from the very beginning that it is the (indiscernible). That is the natural and ordinary meaning, the Impeachment Judgment Clause. So that is an argument that that is explicit.

And I also point out that this Court in *Rose*, in *Rostenkowski*, in *Cisneros* expressly held, this is not a magic words requirement. In other words, it isn't that you've got to say -- it's got to say right there in the text of the Constitution or a statute that this is a right not to be tried. It's that one -- the right, once formulated, has to explicitly include the right not to be tried, and that's why what actually -- the language that's previously in *Midland Asphalt*, as heavily emphasized by Justice Scalia, is the situation where there's interlocutory appeal and the right -- it's a right, the legal and practical value of which is destroyed if it's not vindicated before trial. There's similar language in *Cisneros*, and there are others.

I'd also point out, the Government also has not challenged the Court's jurisdiction. It has conceded --

JUDGE CHILDS: Well, we have to be --

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MR. SAUER: Absolutely.

JUDGE CHILDS: -- secure in our jurisdiction.

MR. SAUER: Yes. Yes, all --

JUDGE CHILDS: Okay.

JUDGE HENDERSON: And hasn't the Supreme Court itself referred to the -- *Midland Asphalt* as a suggestion?

MR. SAUER: I -- yes, I'm not aware of that, but I think --

JUDGE HENDERSON: In *Digital Equipment*.

MR. SAUER: Gotcha. Yes, Your Honor. I believe Your Honor is correct about that, and I think that's an excellent point, and that's reinforced by this Court's case law in *Cisneros*, *Rose*, and *Rostenkowski*.

Turning to the merits, if I may, Your Honor, to authorize the prosecution of a President for his official acts would open a pandora's box from which this nation may never recover. Could George W. Bush be prosecuted for obstruction of an official proceeding for allegedly giving false information to Congress to induce the nation to go to war in Iraq under false pretenses? Could President Obama be potentially charged with murder for allegedly authorizing drone strikes targeting U.S. citizens located abroad? Could President --

JUDGE PAN: So can I explore sort of the implications of what you're arguing? I understand your

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position to be that a President is immune from criminal prosecution for any official act that he takes as President, even if that action is taken for an unlawful or unconstitutional purpose. Is that correct?

MR. SAUER: With an -- with an important exception, which is that if the President is impeached and convicted by the United States Senate in a, you know, proceeding that reflects, you know, widespread political consensus, that would authorize the prosecution under the plain language of the Impeachment Judgment Clause --

JUDGE PAN: Okay.

MR. SAUER: -- so yes, with that exception.

JUDGE PAN: So it seems to me that there are a lot of things that might not go through that process because it's quite a cumbersome process that requires the action of a whole branch of government that has a lot of different people involved, and so in your view, could a President sell pardons or sell military secrets? Those are official acts, right? It's an official act to grant a pardon; it's an official act to communicate with a foreign government, and such a President would not be subject to criminal prosecution?

MR. SAUER: The sale of pardons example is an excellent example because there were allegations about a sale of a pardon, essentially, when it came to President

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Clinton's pardon of Marc Rich, and the U.S. DOJ carefully (indiscernible), and for the very reasons we've emphasized in our brief, decided not to prosecute President Clinton with that because it raised concerns about whether or not a President could be prosecuted for his official acts. There's actually an op-ed in the National Review from Andrew McCarthy.

JUDGE PAN: But your position is that he can't be prosecuted for that --

MR. SAUER: Yes.

JUDGE PAN: -- unless he's impeached.

MR. SAUER: Yes, and that was -- as long as it's an official act. I mean, certain cases, purely private conduct under *Clinton against Jones*, he'd be subject to prosecution for that as long as he's not in office --

JUDGE PAN: Could a President --

MR. SAUER: -- but as long as it's an official act.

JUDGE PAN: Could a President order SEAL Team Six to assassinate a political rival? That's an official act, an order to SEAL Team Six.

MR. SAUER: He would have to be and would speedily be, you know, impeached and convicted before the criminal prosecution.

JUDGE PAN: But if he weren't -- but if he

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weren't, there would be no criminal prosecution, no criminal liability for that?

MR. SAUER: Chief Justice's opinion in *Marbury against Madison* and our Constitution and the plain language of the Impeachment Judgment Clause all clearly presuppose that. What the founders were concerned about was not --

JUDGE PAN: I asked you a yes-no -- yes-or-no question: Could a President who ordered SEAL Team Six to assassinate a political rival who was not impeached, would he be subject to criminal prosecution?

MR. SAUER: If he were impeached and convicted first, and so --

JUDGE PAN: So your answer is --

MR. SAUER: Is --

JUDGE PAN: -- no.

MR. SAUER: My answer is qualified yes. There's a political process that would have to occur under our -- the structure of our Constitution, which would require impeachment and conviction by the Senate. In these exceptional cases, as the OLC memo itself points out from the Department of Justice, you'd expect a speedy impeachment and conviction, but what the

founders are much more worried about than using criminal prosecution to discipline Presidents was what James Madison calls in Federalist No. 47 the, you know, the newfangled and artificial treasons.

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They were much more concerned about the abuse of the criminal process for political purposes to disable the presidency from factions and political opponents, and of course, that's exactly what we see in this case --

JUDGE PAN: But I've asked you a series of hypotheticals about criminal actions that could be taken by a President and could be considered official acts, and I've asked you, would such a President be subject to criminal prosecution if he's not impeached or convicted, and your answer -- your yes-or-no answer is no.

MR. SAUER: I believe I said qualified yes, if he's impeached and convicted first. We may be saying the same thing.

JUDGE PAN: But my question was -- okay. So he's not impeached or conviction -- been convicted. Let's put that aside. You're saying a President could sell pardons, could sell military secrets, could order SEAL Team Six to assassinate a political rival?

MR. SAUER: Sale of military secrets strikes me as something that might not be held to be an official act. The sale of pardons is something that's come up historically --

JUDGE PAN: Okay.

MR. SAUER: -- and was not prosecuted. So --

JUDGE PAN: But your brief says that communicating with an executive branch agency is an official act and

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communicating with a foreign government is an official act. That's what Presidents do.

MR. SAUER: (Indiscernible.) If you look at what Chief Justice Marshall said in *Marbury against Madison*, he said, under -- arising directly under Article II, Section 1, that the courts -- that the President's official acts are, quote, never examinable by the courts, and he says it, like, four different times on pages 164 to 166 in that opinion.

JUDGE PAN: Well, let me ask you about that, then, counsel, because your position is, as I understand it, if a President is impeached or convicted -- impeached and convicted -- by Congress, then he is subject to criminal prosecution, correct?

MR. SAUER: That would be a necessary (indiscernible).

JUDGE PAN: Is that a yes?

MR. SAUER: Yes. Yes.

JUDGE PAN: Okay. So therefore he's not completely and absolutely immune, because under the procedure that you concede, he can be prosecuted if there's an impeachment and conviction by the Senate.

MR. SAUER: Very, very formidable structural check against the astonishing, radical action of prosecuting a former President for his official acts.

JUDGE PAN: Right, but you're conceding that

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Presidents can be criminally prosecuted under certain circumstances?

MR. SAUER: Specifically if they're impeached and convicted. I think that's the main (indiscernible) of the Impeachment Judgment Clause.

JUDGE PAN: And isn't that also a concession that a President can be criminally prosecuted for an official act, because Presidents can be impeached for official acts?

MR. SAUER: Under those unique circumstances.

JUDGE PAN: Correct, but given that you're conceding that Presidents can be criminally prosecuted under certain circumstances, doesn't that narrow the issues before us to, can a President be impeached -- I'm sorry, can a President be prosecuted without first being impeached and convicted? All of your other arguments seem to fall away, your separation of powers arguments fall away, your policy arguments fall away if you concede that a President can be criminally prosecuted under some circumstances.

MR. SAUER: I disagree with that. The Constitution, in the Article II, Section 1, Vesting Clause, as interpreted very clearly by Chief Justice Marshall in *Marbury against Madison*, says, Article III courts lack jurisdiction to engage in examination of the President's official acts. That's been reaffirmed by --

JUDGE PAN: But you just conceded that Article III

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courts can do so if he's been impeached and convicted.

MR. SAUER: The Constitution makes a carefully balanced, explicit exception to that principle in the Impeachment Judgment Clause. So the problem for the separation of powers -- the Constitution does this in many other situations, where it engages in a balancing.

What the framers were most concerned about was not the notion the President would never be prosecuted for things that outrage his political opponents. What they were concerned about was politically motivated prosecutions, but they didn't say the President can never be prosecuted. They set up these --

JUDGE PAN: Correct.

MR. SAUER: -- separation of powers and then created a very narrow exception --

JUDGE PAN: Correct, but --

MR. SAUER: -- that would allow prosecution in those cases.

JUDGE PAN: But once you concede that there's not this absolute immunity, that the judiciary can hear criminal prosecutions under any circumstances -- you're saying there's one specific circumstance -- that that means that there isn't this absolute immunity that you claim.

MR. SAUER: I'm not aware of any case or constitutional doctrine that would say the Constitution sets

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up a very strong principle and it creates a very narrow exception and therefore the exception just makes the principle vanish. I just disagree with that.

JUDGE PAN: That's not what I'm asking you. I'm saying that you're coming before us and saying that there is this absolute immunity that is grounded in the separation of powers, that the judiciary can never sit in judgment on what the President is doing, but you're conceding that that's not true because under some circumstances the judiciary can do that. That's all I'm saying.

MR. SAUER: (Indiscernible), which is a very strong principle in the separation of powers that prohibits Article III courts from sitting in judgment over a President's official acts. There's a very narrow exception for conviction after impeachment --

JUDGE PAN: I understand. I understand, but --

MR. SAUER: -- and that's the end position.

JUDGE PAN: -- it just seems to me that once you concede that Presidents can be prosecuted under some circumstances, your separation of powers argument falls away and the issues before us are narrowed to, are you correct in your interpretation of the Impeachment Judgment Clause? Does the Impeachment Judgment Clause actually say what you say it says? That's all that's really -- we need to decide.

MR. SAUER: I respectfully disagree with that. I

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respectfully disagree with that. There is a strong principle. It's reinforced by Chief Justice Marshall in *Marbury against Madison*. He didn't say we can never sit in judgment over a President's official acts but, because he can be impeached and convicted, therefore we can do it whenever we want to. He said the exact opposite. He says they are never -- they are never examinable by the courts, and that's --

JUDGE CHILDS: So are we answering the larger question about whether there's presidential immunity from criminal prosecution for official acts, or are we looking to a standard on a motion to dismiss which says look to the allegations, take those as true, and then look to whether or not we should be looking at official acts in that lens?

MR. SAUER: Actually, both. The threshold question (indiscernible) is, essentially, there's no such thing as criminal immunity for a former President, and therefore the district court never reached the second issue, which is, if you actually look at the face of the indictment, are these all official acts?

We have strong arguments on both of those things. The notion that criminal immunity for a President doesn't exist is a shocking holding. It would authorize, for example, the indictment of President Biden in the Western District of Texas, after he leaves office, for mismanaging

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the border allegedly and let a Texas jury and Texas judge sit in judgment over the validity of his acts with respect to the border.

JUDGE CHILDS: But you also indicated earlier that when there were pardons or when people were not prosecuted, not everybody goes through an impeachment proceeding before they actually get prosecuted, because that's within the discretion of the prosecutor.

MR. SAUER: Only for subordinate officers. So --

JUDGE CHILDS: Right --

MR. SAUER: -- as the OLC memo points out very clearly, the founding -- the founders, the framers,

actually, in the Constitutional Convention clearly contemplated that that sequence that I've described would be mandatory. He would have to be impeached and convicted first before he -- you could go on to --

JUDGE CHILDS: But impeachment, also, only deals with certain crimes: bribery, treason, high crimes and misdemeanors.

MR. SAUER: Yes, and if you look, actually, at what is said in The Federalist No. 65 by Hamilton about that, high crimes and misdemeanors basically cover anything that the U.S. Senate makes a political judgment justifies removing him from office and authorizing prosecution.

JUDGE CHILDS: But a prosecutor is impartial, does

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not make political judgments, assumingly, to charge.

MR. SAUER: I think that that has no basis in the context of the current prosecution, where the current incumbent of presidency is prosecuting his number one political opponent and his greatest electoral threat in this particular --

JUDGE CHILDS: Asking you from the standpoint of what the Impeachment Judgment Clause is designed to do, that it limits itself to certain acts and then therefore -- and, if convicted, as you indicated, impeached and convicted thereafter, could be prosecution, but not everybody goes through that process, and of course, it's limited to the certain actors in that regard, but not everybody has to go through that process. Prosecutors later on can come into information and evidence after they've investigated, to make their determinations about what they'd like

to criminally prosecute. So you're not always confined to whatever would be in the Impeachment Judgment Clause.

MR. SAUER: Whatever the -- whatever the practice has been with respect to subordinate officers, the -- the evidence from the founding generation is clear, is you cannot to do that with respect to the (indiscernible), and this is one example of many that's reinforced (indiscernible) Supreme Court's case law, the uniqueness of the presidency and the person who occupies the office of the

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presidency.

So, for example, you get repeated statements in *Nixon against Fitzgerald*. It's reaffirmed in *Trump against Mazars*, reaffirmed in *Trump against Vance*, and so forth, about the unique nature of that particular office, and therefore it's --

JUDGE CHILDS: But why -- even under *Clinton*, where there's a deal cut; under President Nixon, where there's a pardon given, there's an assumption that you could be prosecuted, because why enter into those particular acts?

MR. SAUER: Those examples are examples of purely private conduct. For example, *Clinton against Jones* makes very clear that the stuff that President Clinton cut an indictment deal about by admitting to certain wrongdoing in exchange for not being indicted was purely private conduct. Nobody has contended that the President is immune from prosecution for purely private conduct. It's -- the question is, can he be indicted for official acts?

And you've referred to the pardon of President Nixon. We have two things to say about that. President Nixon was accused of a wide range of purely private conduct, and he was facing a potential indictment for that. That's --

JUDGE CHILDS: Okay. So --

MR. SAUER: -- why the pardon was issued.

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JUDGE CHILDS: -- back to purely private conduct, if we go to the indictment, they are not alleging purely -- they're alleging that this is private conduct but -- subject to fraud, not official acts. So why don't you speak to that since you said that we have to look at the broader question as well as the indictment.

MR. SAUER: Yes, Your Honor. So the allegations of the indictment allege only official acts. The only way to even characterize them as private acts is to turn to the alleged motive or purpose for that. So their whole theory, their characterization of the language in the indictment is, oh, we're alleging purely private conduct because it was engaged in for particular purposes, and that's foreclosed by a very long and strong line of Supreme Court precedents --

JUDGE CHILDS: But how does the *Blassingame* case fit here, that we -- this circuit distinguish office seeker versus officeholder in terms of how you're committing the acts?

MR. SAUER: This -- *Blassingame* strongly reinforces what was said -- has been said in Supreme Court cases, in *Stump against Sparkman*, going back to, for example, *Marbury against Madison*, where it's the nature of the act itself. I understand the *Blassingame* opinion to reinforce that by saying it's an

objective -- they use the word objective multiple times -- objective context-specific

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assessment. It does not turn on the purpose or motive. That was strongly pushed in *Blassingame*, and this Court properly rejected. That's consistent with *Nixon against Fitzgerald*, *Bradley against Fisher*, *Spalding against Vilas*, Judge Hand's opinion in *Gregoire*. I mean, it's the strongest -- strongest principle of all in this context.

JUDGE CHILDS: (Indiscernible) I'll turn to my colleagues because I've taken up your time, but we'll give you what you need. With respect to the actual indictment, it does not gloss over what, you know -- and put it in terms as you're describing. So if we look at the face of the indictment as to what's charged, when it's gone through a grand jury process, unlike the Impeachment Judgment Clause, how do we look at those particular acts as described, because we have to take those at face value?

MR. SAUER: There's clear guidance on this from *Nixon against Fitzgerald*, where in *Nixon against Fitzgerald* the allegation was President Nixon had unlawfully terminated a whistleblower, essentially, and that whistleblower came into court and says, this is not subject to immunity because it was unlawful, and the court said, we're not looking at that granular level of detail and we're not considering, most importantly, the alleged motive for these acts. It said that the level of specificity to consider it is conducting the business of the Air Force.

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Similar here, if you look at the indictment, there's five classes of conduct that are alleged, many of which

are just obviously, obviously official conduct. Meeting with the U.S. Department of Justice about who should be the Cabinet-level officer running that is at the heartland of the appointments power.

JUDGE CHILDS: You said many of which. So now --

MR. SAUER: Really, all of which. I mean, our contention is all of which. There's one exception because there's allegations about the Ellipse speech, and under *Blassingame* the contention was made that it should be remanded for that, but if you look at the other public statements, for example, President Trump's tweets, the Second Circuit held in *Knight First Amendment Center* that it was based on overwhelming evidence that's an official channel. His Twitter account during the presidency was an official channel of government communication, and under the objective test in *Blassingame*, all those tweets are obviously immune. So -- also with meetings with the Department of Justice, meeting with members of Congress, that falls right within the heartland of Article II, Section 3, which authorizes the President to communicate with Congress about the matters that he views as expedient.

JUDGE HENDERSON: Let me ask you, first of all, I don't, I don't believe you were counsel then, but what about

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the two concessions made in the first impeachment proceeding and then in *Trump v. Vance* that impeachment should be stayed and wait until he's out of office, when he would be subject to criminal liability?

MR. SAUER: As to *Trump against Vance*, it was purely private conduct that involved a subpoena, a criminal subpoena for tax records that long predated President Trump's time in office. So it was purely private conduct. The concession that he could be subject to prosecution is also correct.

As for the impeachment brief, for example, that they've cited in their briefs, what that says is, we have a judicial process in this country, period; we have an investigative process in this country to which no former officer is immune. It did not say there could never be raised an immunity defense. It said, criminal process can go forward.

JUDGE PAN: I'm sorry. There's a quote in the congressional record in which your counsel -- I'm sorry, your client said through counsel, no former officeholder is immune from investigation and prosecution.

MR. SAUER: Investigation is what there's no immune to.

JUDGE PAN: And prosecution.

MR. SAUER: Well, that may be true of subordinate

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officers, but as to the principal officer, the President, he is immune unless he is impeached and convicted.

JUDGE PAN: But he --

MR. SAUER: Again, it comes back to the point we made --

JUDGE PAN: He was, he was President at the time, and his position was that no former officeholder is immune, and in fact, the argument was, there's no need to vote for impeachment because we have this

backstop, which is criminal prosecution, and it seems that many senators relied on that in voting to acquit.

MR. SAUER: That relies on speculation. (Indiscernible) statement and what -- I mean, the court, I think, lacks the ability to intuit what senator -- what motivated senators' votes in the impeachment process. What the Constitution says is --

JUDGE PAN: No, but the question --

MR. SAUER: -- you must be impeached and convicted --

JUDGE PAN: -- I think the question that Judge Henderson was asking you was, you took the position, or your client did, during the impeachment proceedings that there would be an option for criminal prosecution later, and it's in the congressional record, and I guess the question is, what has changed or why have you changed your position?

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MR. SAUER: Yes, we agree with that characterization of his statements in the congressional record. I believe there was a distinction between the judicial process and the investigative process. That was in the quote that I just read. In addition to that, whatever concession may or may not have been made there would not have a res judicata effect in this proceeding. These are very different proceedings.

And, again, so -- again, the notion that no one is immune from the judicial process and the judicial process should go forward is fully consistent with the notion that defenses, including presidential immunity, which, again, is rooted in the separation of powers, could be raised in those processes. So the

notion that there could be a criminal process and then defenses like this could be raised in that process is, I think, pretty straightforward.

There's no concession that there's no such thing as criminal immunity. There's no concession in those proceedings that what the district court in this case did, the very kind of astonishing holding that no President is criminally immune from prosecution, is just -- I think it's not there in the congressional record.

JUDGE HENDERSON: Let me go back to *Marbury v. Madison*, and you isolated that one sentence. Isn't it true that the progeny of *Marbury v. Madison* has distinguished

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between discretionary official acts and ministerial, by which they mean imposed by law, and that -- it's the, it's the latter one in which he can be held liable, and I want you to address both *U.S. v. Johnson* and the *Commonwealth of Virginia*, because the first one deals with the Speech and Debate Clause and the Supreme Court said, in essence, lop off all of the evidence dealing with speech and debate, he can still be prosecuted -- that is, that congressman -- or I think it was conspiracy to defraud the U.S. of something, and then in the *Commonwealth of Virginia*, you had the judge who had been charged with a crime under which you could not discriminate in picking jurors based on rape, and I -- my reading of that case is that -- the language that you isolate in your reply brief that it could just as easily be done, that is, the choosing of the jury, (indiscernible) a ministerial act by someone on the street, to me that means, when you have a duty that is imposed by law -- picking a jury they said was ministerial, imposed by law -- whether you're the man

on the street, whether you're the President, whether in that case you're the judge, you can be held criminally liable, and that's how I -- that's how I read, if not *Marbury*, the progeny; that is, you can't stop at official act; you have to say, was it a discretionary official act or was it a ministerial official act?

MR. SAUER: I agree with that characterization of

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Marbury. I think that distinction is present in *Marbury* itself, and I think what I'd respond to that is to say, first of all, that extension has never been extended up to the President and for good reason, because for over 200 years, the courts have held we can't sit in judgment over the President's official acts under any circumstances.

So, for example, *Mississippi against Johnson* --

JUDGE HENDERSON: Not criminally, though. Not criminally. We don't have any (indiscernible).

MR. SAUER: That's correct. It's never arisen until this case. That is absolutely correct, but if you look at every civil context, what they've said -- and keep in mind that what Chief Justice Marshall says is, never examinable, never examinable. So there would be no judicial proceeding where you could say, the President did this and we're going to sit in judgment directly over that. That's reinforced by *Mississippi against Johnson*, by *Swan against Clinton* from this Court more recently, where the courts hold that we can't even enjoin or even really enter a declaratory judgment directly against the President for his official acts, whereas the distinction between ministerial and discretionary has been held totally with respect to subordinate officers, and that goes all the way back to *Marbury*.

However, if you look at the indictment in this

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case, nothing that's alleged against President Trump could remotely be described as ministerial. I'm not aware the Government has ever argued that. If you're talking about, you know, responding to widespread allegations of fraud, abuse, and misfeasance in a presidential election, trying to find how to respond to that in a manner that's in the national interest, matters of that nature are not ministerial at all. So even if there -- even if that distinction goes all the way up to the (indiscernible), so to speak, it wouldn't save the indictment here.

JUDGE HENDERSON: Why isn't it ministerial? And his constitutional duty to take care that the laws be faithfully executed requires him to follow those laws, every one of them.

MR. SAUER: Yes. I mean -- I mean, I would say that the Take Care Clause -- carrying out one's duties in the Take Care Clause are inherently discretionary.

An example of a ministerial act, for example, in *Marbury against Madison* is like delivering a seal when you're requested, because there's a separate statute, right? What they emphasize is, there's a separate statute. The Secretary of State had kind of these two hats on. He was, on one hand, a direct agent of the President, and that could never be examinable by the courts. On the other hand, the original statute had posed all these, like, purely

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ministerial duties that had to do with recordkeeping and delivering documents, like if you've got a land

deed that's got a seal on it and a person asks for it, where there's no discretion at all.

When you're talking about the Take Care Clause, there's no statute that could impose on the President a, you know, a mandatory duty to engage. I mean, the notion that when the President is meeting with the Department of Justice, for example, saying, hey, we should investigate and enforce federal fraud statutes, the notion that that's ministerial strikes me as insupportable.

JUDGE HENDERSON: Well, I think you're missing what I'm -- what I'm asking you, which is, I think it's paradoxical to say that his constitutional duty to take care that the laws be faithfully executed allows him to violate criminal laws. Now, we're at the motion to dismiss stage. The Government has charged the specific criminal laws. We have to assume they're true.

MR. SAUER: I mean, my response to that, I think, would be to emphasize what Chief Justice Marshall said in *Marbury*, which is that they can never be examinable by courts. That naturally --

JUDGE HENDERSON: But I thought --

MR. SAUER: -- includes a criminal proceeding.

JUDGE HENDERSON: But I thought you agreed with me

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that we've gotten beyond *Marbury* in the sense that official acts has been subdivided into discretionary and duty bound or ministerial, and in the ministerial or duty bound, at least with respect to even legislators and judges, they have been criminally -- held criminally liable, and that's in the face, at least with

respect to the legislators, of an explicit constitutional privilege.

MR. SAUER: Yes. I don't view *United States against Johnson* and even *Ex parte Virginia* as resting on the ministerial versus discretionary distinction. I think what *Johnson* says is -- it doesn't say, hey, when you were doing these other things, they were ministerial. What it says is, these were not legislative acts, right? And so what -- it draws a distinction between legislative and non-legislative acts.

So, also, I think that's the right reading of *Ex parte Virginia*. It goes -- they go on to say judicial act. In other words, the argument that picking a jury -- I don't even believe they used the word, to my recollection, ministerial. They say --

JUDGE HENDERSON: Because they were criminal acts. They were criminal acts. Picking the jury based on race is a criminal act, and whatever Johnson did, I think it was the very same statute, fraud against the United States, that is before us today, and --

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MR. SAUER: We would say that the distinction in those cases is between, in the judicial case *Johnson* -- or sorry, legislative -- I'm sorry. The legislative case *Johnson* is between legislative acts and non-legislative acts. The distinction in *Ex parte Virginia* is between judicial acts and nonjudicial acts. That phrase is used, and here the distinction is between presidential acts and non-presidential acts, and everything that's alleged in the indictment is a presidential act.

Your honor, I see, I think --

JUDGE PAN: Counsel --

MR. SAUER: Go ahead.

JUDGE PAN: May I? There are a number of precedents or cases in which the Supreme Court has reviewed actions by the President, the seminal case of *Youngstown Sheet & Tube*, where the Supreme Court reviewed Harry Truman's seizure of the steel mills during the Korean War. There's also the case of *Little-Barreme*, where -- *Little v. Barreme* -- where Chief Justice Marshall reviewed the actions of President Adams when he seized certain vessels. *Trump v. Hawaii* was reviewing President Trump's order restricting the entry into the United States of nationals from certain foreign countries. How does that square with your position that the judiciary can never review executive action?

MR. SAUER: All those cases fall squarely within

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the well-established exception in *Ex parte Young*, where the judiciary is allowed and does frequently issue declaratory judgments, injunctions, judgments against subordinate officers, even when they're --

JUDGE PAN: Okay. These are Presidents. These are Presidents. Harry Truman was the President when he seized the steel mill. How does that comport with your theory?

MR. SAUER: I believe, for instance, in that case it was an injunction against the Secretary of Commerce, not against the President. This Court has reaffirmed very recently that you cannot issue an injunction directly against the President. The court has no jurisdiction to do that, cannot enter -- it strongly

indicates in *Newdow against Roberts* that the court can't even enter a declaratory judgment --

JUDGE PAN: But the court can review presidential action if on paper they direct their judgment to a subordinate officer. Is that what you're saying? And because these are presidential actions.

MR. SAUER: The court can definitely enjoin the actions of subordinate officers that violate the Constitution. That is *Ex parte Young*. All the cases fall within --

JUDGE PAN: I understand that, but I'm asking you

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a different question, because these are presidential decisions, presidential actions, and you're saying that the court can review presidential actions as long as, when they issue the judgment, they issue it to a subordinate officer.

MR. SAUER: Indirect context. It can't directly sit in judgment over the President's official acts. It's been established for over 200 years.

JUDGE CHILDS: You're using the Impeachment Judgment Clause essentially as a negative implication with respect to that the civilian officer or President, of course, has to be impeached and convicted and then nevertheless thereafter. If there is an acquittal, how are you using it in that regard, because sometimes, and particularly in this case, the acquittal can arise from lack of jurisdiction, not actually trying the merits of the case?

MR. SAUER: The Impeachment Judgment Clause does distinguish between those sort of merits-related acquittals and non-merits-related acquittals. Frankly,

this same sort of thing comes up in just criminal prosecutions under the Double Jeopardy Clause, where, you know, a determination that the defendant is acquitted does not necessarily reflect an actual determination that they're not factually guilty, and in fact, this is emphasized in the OLC memo that they themselves address, that actually -- you know, that determination often reflects things that are distinct from

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the merits. So that doesn't, I think, in any way undermine the sort of double jeopardy force, so to speak, of the Impeachment Judgment Clause.

JUDGE CHILDS: And one of the briefs indicated that Jack Smith is improperly appointed. Do you have a position there?

MR. SAUER: That's a very persuasive brief, but I can see we have not raised it in this case. I think it raises very powerful questions, but we haven't raised it in this case and at this time.

JUDGE HENDERSON: Let me ask you just about the effect of *Blassingame*. If we say we can't determine if these acts are official or private, I want to stay away from that, I'm going to say ministerial or discretionary, and *Blassingame* characterized it in terms of office seeker versus officeholder, what is your position about -- would we have to remand it for the district judge to decide in the first instance whether these various -- the four points that the Defense has made against imposing criminal liability hinge on whether the acts are ministerial, discretionary, official, private, however you want to characterize it?

MR. SAUER: I'd use the phrase from *Clinton against Jones*, which says purely private conduct is

what can be, you know, subject to judicial process after a President leaves office.

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In response to your question, our principal position is, you can look at this indictment and it alleges official acts and it can be ordered dismissed. We acknowledge, though, that the district court didn't reach that issue, and *Blassingame* did remand, and the Court absolutely has the discretion to remand to the district court for the application of the doctrine of criminal immunity in the first instance, and we admit that that would be a natural thing for the Court to do.

JUDGE HENDERSON: To the specific acts?

MR. SAUER: Correct, yes. In other words, if the Court holds that there is presidential immunity, which it should, then remand to the district court to say, okay, go through the indictment and -- or else hold factual findings and so forth to decide how it applies to the conduct alleged in this case. We acknowledge that would be -- the Court has the discretion to do that and that would be a natural course.

And if there are no further questions --

JUDGE PAN: I have one more question. So under the framework established in -- or discussed in *Nixon v. Fitzgerald*, we're supposed to conduct a balancing test where we balance the need for the asserted immunity versus other public interests, and I see you as trying to represent a need for the executive to have this immunity to facilitate

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executive functions, the ability to act without hesitation, to be fearless, to make decision-making

with -- to make decisions without being inhibited by the fear of prosecution, but it seems to me that there are some other Article II interests here that are countervailing. For example, under the -- under Article II there's an Executive Vesting Clause, and so there is an interest of the executive branch as an institution to have constitutional executive power vest in a newly elected President. There's also an executive interest as an institution in law enforcement, in enforcing criminal laws.

And so it seems to me, if we're weighing executive interests versus public interests, public interests in things like the integrity of an election, that President Trump's position is not fully aligned with the institutional interests of the executive branch and, in this balancing test, that weakens the executive power that he's trying to assert.

MR. SAUER: I say three things in response to that. First of all, *Nixon against Fitzgerald* emphasizes that the most compelling consideration, when one considers what it describes as policy considerations rooted in our -- or in the separation of powers, is the rendering of the executive branch official unduly cautious, unduly cautious in the exercise of highly controversial and sensitive

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decisions that come up all the time.

If a President has to look over his shoulder or her shoulder every time he or she has to make a controversial decision and worry, after I leave office, am I going to jail for this when my political opponents take power, that inevitably dampens the ability of the President to --

JUDGE PAN: No, I understand that that's your position, but I guess I'm asking you, what about other Article II interests? That's one interest, but there are other Article II interests in play here too, and they seem to be countervailing. The interest in executive vesting, the interest in law enforcement, those are also executive branch interests, and how should that affect the analysis?

MR. SAUER: Those -- to the extent the Court conducts a balancing, our principal position is, you can go back to *Marbury v. Madison* and adopt a categorical rule, which is also referenced in *Nixon against Fitzgerald*, but to the extent the Court reaches the balancing of policy considerations, those are decisively outweighed by the sort of Republic-shattering consequences of subjecting our chief executives in an endless cycle to prosecution once they leave office. The founders were very much against that. They were deeply concerned with that. You see that in Hamilton's writings in Federalist 65, 69, and 77. You see

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it reflected in Madison's concern about newfangled and artificial treasons in Federalist 47, and that is the original meaning of the Constitution.

JUDGE HENDERSON: Do you think we should -- it just occurred to me -- do you think we should take any cognizance of the fact that when they wrote that, George Washington was the President? I mean, a very, very strong executive, the Congress was brand new, everything else was brand new, and things have balanced out. I mean, we've got a strong Congress, we've got a strong judiciary, and we've got a strong President.

MR. SAUER: I think that if you look at the writings of the founders, they were definitely looking past the presidency of George Washington, obviously an iconic figure, looking past the presidency of George Washington, future presidencies, and they correctly anticipated that the nation might -- what they were deeply concerned about was that the nation would devolve into factions.

Factionalism did not govern the presidency of George Washington because of his moral authority; however, immediately, when you got to Adams and Jefferson, you immediately devolved into factions. They correctly anticipated and were deliberately looking past that presidency to the future of the Republic, a tradition that stood for 234 years until last year when it was shattered by

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the indictment of President Trump.

And for -- if the Court has no further questions, we would ask the Court to reverse, and if the Court rules against us in any respect, we renew our request that the Court stay its mandate to allow us to seek further review, both en banc and/or Supreme Court review.

JUDGE HENDERSON: Right, and you do have five minutes of rebuttal.

MR. SAUER: Thank you, your honor.

JUDGE HENDERSON: Okay. Mr. Pearce.

ORAL ARGUMENT OF JAMES PEARCE, ESQ.

ON BEHALF OF THE APPELLEE

MR. PEARCE: Good morning, and may it please the Court. Never in our nation's history until this case has a President claimed that immunity from criminal prosecution extends beyond his time in office. The

President has a unique constitutional role, but he is not above the law. Separation of powers principles, constitutional text, history, precedent, and other immunity doctrines all point to the conclusion that a former President enjoys no immunity from criminal prosecution. At a minimum, this case, in which the defendant is alleged to have conspired to overturn the results of a presidential election, is not the place to recognize some novel form of criminal immunity.

Now, I want to start --

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JUDGE CHILDS: Thank you.

MR. PEARCE: -- with jurisdiction, as Judge Childs raised. It is our view that the Court has and should entertain both claims before it. With respect to the immunity claim, I think this Court's decision in *Cisneros*, 10 years after *Midland Asphalt*, did allude to a type of separation of powers claim that would -- involving presidential immunity. I think Judge Henderson pointed out, the Supreme Court itself has acknowledged that this idea of an explicit guarantee is more of a suggestion than some sort of statutory prescription.

JUDGE CHILDS: But there's been no cases since then that have actually used that word suggestion to follow up on that line of thinking.

MR. PEARCE: Within the Supreme Court, I don't believe there have been cases, but certainly, this Court in *Cisneros* as well as in cases also post *Midland Asphalt*, like *Rose*, *Rostenkowski* and *Durenberger*, have recognized that this type of a separation of powers claim, when you're talking about immunity, is something for which a collateral order -- appellate jurisdiction on a collateral order theory is available.

JUDGE CHILDS: And there are also other circuits -- I think it's First, Second, and Tenth -- that keep following that line of thinking with respect to *Midland*

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Asphalt: It requires an explicit constitutional or statutory language that says you cannot be tried.

MR. PEARCE: So two responses -- one, I think in cases like *Cisneros*, this Court has spoken otherwise, but nonetheless, I think the only one there is the First Circuit's decision in *Joseph*, where it was the case of a judge seeking a criminal -- raising an immunity defense to a criminal prosecution.

As this Court acknowledged in both, I believe, *Rostenkowski* and *Durenberger*, that's in some tension with -- or it didn't acknowledge that, but the case -- the Court there talked about *Claiborne* and *Hastings*, which are Ninth Circuit and Eleventh Circuit cases. I think Judge Easterbrook, in his *Schock* opinion, noted that when it deals with a personal immunity like that, it's different than the kind of transactional immunities that were considered in the Tenth and the Second Circuit cases, and at the end of the day, I think we do -- sort of a small point of common ground between us and the defendant -- we do think that with respect to jurisdiction, there is a little bit of a different inquiry with respect to a President. We don't think that carries over to the merits in the least, and I think *United States v. Nixon* is sort of the perfect example of that. There the court said it would be unseemly to hold the President -- to require the President to go into

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contempt; nonetheless, reaching the merits, of course, rejected President Nixon's absolute executive privilege claim and required that the --

JUDGE CHILDS: You don't see a distinction on the civil versus criminal context, because the cases I'm referring to are criminal cases?

MR. PEARCE: So I don't, and *Rose* said as much here when talking about civil and criminal with respect to speech or debate, and again, I mean, I know, I know *Nixon v. Fitzgerald* is a civil case, and we strongly disagree that it should be applied here for many of the reasons that Judge Pan set out, but I do think with respect to the immunity, again, given the language in *Rose*, that would supply a basis for this Court to entertain the immunity claim.

Now --

JUDGE PAN: But why aren't you taking the position that we should dismiss this appeal because it's interlocutory? Doesn't that advance your interests?

MR. PEARCE: Our interests are twofold: One, as, you know, as in *United States v. Nixon*, it is doing justice, and then a second is indeed to move promptly to satisfy and vindicate the public's and the defendant's interest in a prompt resolution of this trial, but doing justice means getting the law right, and it's our view that even if a dismissal on jurisdiction might move this case faster --

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actually, empirically that's hard to know -- we just don't think that's the right analysis here on either immunity or the second claim.

JUDGE PAN: So we have a line of cases, including *Kramer v. Gates* and *American Hospital Association v. Azar*. It says that we can assume hypothetical statutory jurisdiction and reach the merits of a case,

statutory jurisdiction being distinct from Article III jurisdiction, which we could never assume because that implicates the power of the Court to act.

So if we had discretion to reach the merits versus just dismissing this case under *Midland Asphalt*, which I think is a strong precedent, which suggests that this appeal is interlocutory and not -- does not fall under the collateral order doctrine, how should we determine how to exercise that jurisdiction about whether or not we should reach the merits?

MR. PEARCE: So I think in the *American Hospitals* decision, the 2020 decision, the Court said -- the formulation was something like, we're doubtful as to our jurisdiction but nonetheless, invoking the line of cases you've just described, went on to decide the merits. We would urge the Court to do the same here, even if it entertains doubts with respect to the jurisdiction. Yes, hypothetical statutory jurisdiction is available under the

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law of this circuit. The Court should use that to reach the merits.

JUDGE CHILDS: But doesn't that lead to a hypothetical decision and an advisory opinion?

MR. PEARCE: No. I think that that -- so we disagree --

JUDGE CHILDS: But the Supreme Court has said that.

MR. PEARCE: No, I don't think the Supreme Court has said that. I mean, *Steel Co.* is kind of the leading Supreme Court decision, and then some courts, including this Court, has devised a hypothetical statutory jurisdiction doctrine.

Now, if this Court were to dismiss for lack of jurisdiction and then say, nonetheless, as an alternative holding, you know, here's how we would come out on the merits, that, I think, would be improper, and I -- that is what I understand the American Oversight brief to be suggesting at footnote 11 on page 20 of its brief. That, I don't think is something the Court could do. I understand the hypothetical statutory jurisdiction piece to allow the Court to say: You know what? This is hard. There might be arguments on both sides. We think that there is -- we assume hypothetical statutory jurisdiction. We move forward if we decide the merits.

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Now --

JUDGE HENDERSON: Let me ask you about *Marbury v. Madison*. What's your interpretation of its progeny or even the case itself?

MR. PEARCE: So our interpretation is much closer in line with what I think I heard Judge Pan setting out and similar to yours. It certainly does not erect an unreviewable power for the presidency. I think the -- sort of the prime example of that is the steel seizure case, the *Youngstown* case. That was President Truman closing the steel mills. That was the court coming in and reviewing that. We see that all the way through to the present, and so it's hard to see any world in which the Court just says, you know, we can't, we can't intervene here.

We do see -- I accept the Court's, Judge Henderson, the distinction between sort of ministerial and discretionary acts. Compliance with the law is not some sort of discretionary call, right? It is something that the -- I fully endorse or agree with the idea of the

paradox of a President, on the one hand, having the Article II take-care responsibility and, on the other hand, sort of seeing the law as compliance with the law is optional.

JUDGE HENDERSON: Let me switch and ask you, how do we write an opinion that would stop the floodgates? Your predecessors in their OLC opinions recognized that criminal

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liability would be unavoidably political.

MR. PEARCE: So a couple of responses -- for one, of course, that was with respect to a sitting President. I think the analysis is extraordinarily different with respect to a former President, which OLC in that very same -- I'm sorry.

JUDGE HENDERSON: But with respect to being necessarily political.

MR. PEARCE: Well, I think there is a political process, which is impeachment, and we can talk about that, but there is a legal process, which is decidedly not political, and that is a process which has the kinds of safeguards that a couple of members of the Court here have already referred to. We're talking about prosecutors who follow our -- you know, who follow strict codes and who are presumed to act with regularity, grand jurors, petit jury eventually, and this Court sort of standing -- Article III courts standing above it, but I also want to push back a little bit against this idea of a floodgate.

At least since the Watergate era 50 years ago, has there been widespread societal recognition, including by Presidents and the executive branch, that a former President is subject to criminal prosecution. And

Nixon was not about private conduct. Nixon was about, among other things, using the CIA to try to interfere with an FBI investigation. He

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then accepts a pardon, understanding that -- after having resigned, right? So, again, I think that also undermines this impeachment-first argument.

After Nixon, we then see a series of independent and special prosecutors investigating a range of different types of conduct. You saw Independent Counsel Lawrence Walsh in the Iran-Contra affair. That's an example that the defendant invokes in his reply brief. In Chapter 27 of that report, the independent counsel assumes that President Reagan is subject to prosecution and says, but we don't -- we didn't get there evidentiarily, right, not where we thought there was some sort of immunity, and that has continued through to the present.

And so this notion that we're all of a sudden going to see a floodgate, I think the -- you know, again, the careful investigations in the Clinton era didn't result in any charges. The fact that this investigation did doesn't reflect that we are going to see a sea change of vindictive tit-for-tat prosecutions in the future. I think it reflects the fundamentally unprecedented nature of the criminal charges here.

Never before has there been allegations that a sitting President has, with private individuals and using the levers of power, sought to fundamentally subvert the democratic republic and the electoral system, and frankly,

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if that kind of fact pattern arises again, I think it would be awfully scary if there weren't some sort of mechanism by which to reach that criminally.

JUDGE CHILDS: In your brief you raised some sort of lesser immunity potentially applying. Want to speak to that?

MR. PEARCE: I do. We don't think that comes into play here. I think the point was, in some sort of more challenging cases, it might be that -- where a President is operating under extraordinary time pressure, has to make a very difficult kind of national security type of decision, you know, do I go in and commit this kind of -- do we order the drone strike? Under these circumstances, you know, a President will often have a cadre of lawyers to advise him or her. The lawyers say, Madam President, we'll get you a memo in two months. That's not going to be enough in that situation.

If there were a drone strike, civilians were killed, that theoretically could be subject to some sort of prosecution as murder. I think that might be the kind of place in which the Court would properly recognize some kind of immunity, but that is, of course, nothing like what we've got here. I sort of take the former officials' brief discussing the Vesting Clause to talk about the -- kind of the nature of charges when they focus on, again, subverting

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the electoral process. At a minimum, there's going to be -- there should be no type of immunity that covers that.

JUDGE PAN: So are you saying it should be a case-by-case balancing in each case whether there's immunity, or how does this work as a legal standard?

MR. PEARCE: So we think that it should just be, as the district court held, a finding -- there is a balancing under *Fitzgerald*, right? That's our view. You start with this question: What are the burdens against the presidency and what are the interests to be furthered? I think the answer to that question under *Fitzgerald*, we think that the burdens that my friend talks about on the other side are overstated. I'm happy to just describe why. We think the interest in -- the public's interest in an ongoing criminal prosecution means that there should be an across-the-board rule that a former President is indeed subject to criminal prosecution.

What I'm describing in response to Judge Child's questions is, in a particular case, might there be some extraordinary circumstance where a President -- a former President could invoke an immunity? Maybe. I don't think the Court has to reach that there. I think the Court could write an opinion that reserves and says, based on the nature of the allegations, which we take as true, there is no reason to recognize that here. And so I don't think it

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needs to be a case-by-case analysis, but I think the Court can reserve that type of question to the extent it gives one pause about a President in future situations.

JUDGE CHILDS: To that end, can you answer the question I posed earlier to your opposing counsel about, are we to look at the broader question that was dealt with by Judge Chutkan with respect to presidential immunity, no criminal -- absolute immunity for no criminal prosecution of official acts

versus looking at this indictment and accepting as true the allegations that it brought there or both?

MR. PEARCE: So we have a strong preference that the Court adopts the former view and looks at the question in the, in the way of -- as the district court did, which is to say, based on questions of separation of powers, of constitutional text, history, precedent, is there in fact immunity for a former President? We think the answer to that is no, for, of course, all of the reasons we put in the brief and I'm happy to sort of address here.

Candidly, I think if the Court gets to that second question, there are some hard questions about the nature of official acts, and frankly, as I think Judge Pan's hypothetical described, I mean, what kind of world are we living in if, as I understood my friend on the other side to say here, a President orders his SEAL team to assassinate a

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political rival and resigns, for example, before an impeachment, not a criminal act; a President sells a pardon, resigns, or is not impeached, not a crime? I think that is extraordinarily frightening future, and that is the kind of -- we're talking about a balancing and a weighing of the, of the interest. I think that should weigh extraordinarily heavily in the Court's consideration.

JUDGE HENDERSON: Let me ask you about the effect of *Blassingame*. How does it -- how does it either bind us, how is it persuasive for us --

MR. PEARCE: So I think it formally has no application at all because, of course, very early on in the opinion the Court says, we're not dealing with any questions of immunity in the criminal context.

I tend to agree with my friend on the other side that in many respects it does reinforce the nature of the *Fitzgerald* civil outer-perimeter standard. It says you don't look at intent or you don't look at purpose; context plays a more important role than often the content of communications. I think the significant change, of course, is the acknowledgement of the -- looking at a President, whether that President is acting in his or her role as office seeker or officeholder.

But again, to go back to my response to Judge Childs' question, although that would change the nature of

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whether certain -- may change the nature of whether certain things are or are not official acts in the indictment, we just think that's entirely the wrong paradigm to use. We think under *Fitzgerald* -- in fact, that would be inconsistent with *Fitzgerald's* reasoning and also just irreconcilable with the nature of how criminal law works.

I mean, to say that we're not going to take account of motive or intent, there are plenty of acts that in -- that -- every day. I mean, for example, if I were to encourage someone not to testify at trial because I wanted to go on a hike with that person, it's not a crime. If I were to encourage someone not to go on a hike because their testimony at -- sorry, encourage them to skip their trial testimony because their testimony was going to incriminate me, it's the same underlying act, and now, when you map that onto the criminal -- to the presidential context, you come up with some of the frightening hypotheticals where, as long as something is plausibly official, even if it involves assassinating a prominent critic or a

business rival, that would seem to then be exempt, potentially, from criminal prosecution. We certainly wouldn't concede that if that's the world we need to live in. I think we would advance plenty of arguments below, but we really -- but those arguments themselves would create satellite litigation that are an additional reason not to go down this route.

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JUDGE CHILDS: But looking and thinking about your answer about potentially not looking at motive and intent, when there is a criminal prosecution, that mens rea and that intent is part of the actual statute charged criminally.

MR. PEARCE: Yes, precisely, and that's why it wouldn't make sense to then come in and use this nonmotive intent. As I understand how *Fitzgerald* outer-perimeter standard might work, it could say those types of official acts, official conduct, that is something from which the President is immune. You don't ever get to that second question of, well, did that person act, then, with mens rea, can we prove it beyond unreasonable doubt, because it is -- at least under a theory where it's not available at trial, then there's no way to reach that conduct.

JUDGE CHILDS: When we're looking at this indictment, though, back to Judge Henderson's question about the use of *Blassingame*, some of the acts are same or similar and there was direct discussion of it in that opinion as determining whether it was office seeker versus officeholder. So do we use *Blassingame* at least for that?

MR. PEARCE: So if this Court decides the case the way the district court does -- did, pardon me -- then I don't think *Blassingame* has any role to play at all,

because there is no question of whether, you know, was this act official or were these sets of allegations official?

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The question is, based on a *Fitzgerald* analysis and, you know, history, precedent, et cetera, you know, is there any quantum of immunity for a former President? We think the answer to that question is no. There's no reason, as the district court also found, to turn to the indictment and consider this outer-perimeter -- this civil outer-perimeter standard.

JUDGE HENERSON: How about if we don't decide it the way the district court did?

MR. PEARCE: If you don't, I mean, I suppose a lot would --

JUDGE HENDERSON: I mean, on the *Blassingame* issue.

MR. PEARCE: So there are a lot of different ways this Court could not decide it that way. I think, to pick up on my response to Judge Childs, we certainly stand by our view in the brief that some substantial number of allegations would fall outside of an outer perimeter, and that, I think, is enough to affirm. I think either parties are urging the Court at that point to then send, of course, the case back to the district court.

I think that, then, would create a series of challenging questions that I mentioned earlier: What are the -- what are the evidentiary theories under which that evidence could potentially come in, and -- but it would be

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our strong view and we would want, if the Court followed that route, which we urge the Court not to, to

make clear that immunity is an on-off switch, right? This is the immunity appeal. If the Court says we affirm, we send it back, there's no immunity, then other things become evidentiary questions or questions really of jury instructions, which any appeal is then an appeal from a final judgment, if any final judgment.

JUDGE CHILDS: And the immunity defense is never lost.

MR. PEARCE: Well, I don't think it's immunity at that point. I think this Court will, in what I've just described, will have said there is no immunity. There may be some types of other challenges as evidence comes in at trial, but again, I think that would lead to this extraordinarily complicated litigation that is not the top-line reason but certainly among the reasons why the Court should not go down that path.

JUDGE PAN: Since President Trump concedes that a President can be criminally prosecuted under some circumstances -- he says that that is true only if he is first impeached and convicted by Congress -- do you agree that this appeal largely boils down to whether he's correct in his interpretation of the Impeachment Judgment Clause -- that is, if he's correct that the Impeachment Judgment

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Clause includes this impeachment-first rule, then he wins; and, if he's wrong, if we think the Impeachment Judgment Clause does not contain an impeachment-first rule, then he loses?

MR. PEARCE: So I think that's basically right. I mean, the defendant's theory over the course of this litigation has evolved a bit, and I think now before this Court I understand the arguments to be principally --

sort of the principal submission to be as you've just described, this -- what we call in our brief the condition precedent argument, that there is only liability -- criminal liability for a former President if that President has been impeached and convicted, and that is wrong for textual, structural, historical reasons, and a host of practical ones, one of which I'll start with, again, to just amplify the point. It would mean that if a former President engages in assassination, selling pardons, these kinds of things and then isn't impeached and convicted, there is no accountability for that, for that individual, and that is, that is frightening.

Now, to go back to some of the textual and historical and structural, you know, my friend on the other side sort of suggests this is what the founders were talking about and this is what they were worried about. I think that's entirely an inaccurate representation of the founding

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era history. There's basically no discussion of the Impeachment Judgment Clause, which I take the defendant's principled textual argument to be.

What the Impeachment Judgment Clause did was two things, as the district court described, right? It constrained the sanctions that Congress could place on an impeached and convicted officer -- not only a President, any kind of officer -- to removal or disqualification, and then it made clear that that impeachment did not impose some sort of preclusive bar on subsequent criminal prosecution.

You would think that if there was this kind of impeachment-first requirement, impeachment and conviction first, you might actually find something

somewhere in the sources, the framing -- the Convention in Philadelphia, the ratification discussions, early history. There is nothing of that. We've cited certain things in our brief from James Wilson, from Edmund Pendleton, from Representative Dana that say this, Justice Story. I don't hear the defendant to offer anything other than, well, Hamilton. All that Hamilton was describing was the undisputed point here that a sitting President can't be subject to criminal prosecution until that sitting President is no longer in office, whether the removal from office is through impeachment and conviction or simply the end of the term.

Now, a structural point, as well, that I just want

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to quickly make -- the district court made this -- which is, if this rule were right, that would -- if the condition precedent rule were correct, it would pose significant separation of powers problem of its own. It would basically mean that the executive branch would only be able to prosecute someone if Congress had acted, and there are all sorts of reasons why, of course, Congress won't act. For one, they've never believed that it was required, and also, in certain instances they may decide that they don't have jurisdiction. Many of the, of the members of Congress seem to hold that view with respect to the defendant's second impeachment.

JUDGE HENDERSON: All right.

MR. PEARCE: Thank you very much.

JUDGE HENDERSON: Yes, go ahead.

REBUTTAL ARGUMENT OF D. JOHN SAUER, ESQ.

ON BEHALF OF THE APPELLANT

MR. SAUER: Thank you, Your Honor, and in my limited time remaining, I just want to make three points to the Court in response to the opposing counsel's argument there. One is that the opposing counsel used the phrase above the law, saying that an immunity doctrine for criminal immunity would place the President above the law. I would just direct the Court's attention to what the Supreme Court said in *Nixon against Fitzgerald* in the context of civil

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immunity. They describe the allegation that immunity sets the official above the law as, quote, rhetorically chilling but wholly unjustified. The U.S. Constitution, the separation of powers, the Executive Vesting Clause, the Impeachment Judgment Clause, these are the foundational and fundamental law of our country, and the President's immunity is determined on that. So that is more rhetoric than reality, is what the Supreme Court said in *Nixon against Fitzgerald*.

I'd also point out that when it comes to the question of whether or not the indictment alleges solely official acts, the indictment does not allege that President Trump did anything wrong after he left office. So it focuses solely on acts that he took while he was in office, and that's a telling indication that we're dealing with official acts here.

And then finally, I would address, Judge Henderson, your question about the floodgates, and I tie that to what my opposing counsel said about a so-called frightening future. The frightening future that he alleges where Presidents are very, very seldom, if ever, prosecuted because they have to be impeached

and convicted first is the one we've lived under for the last 235 years. That's not a frightening future. That's our Republic.

What he is forecasting is a situation where the

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floodgates will be open. We are in a situation where we have the prosecution of the chief political opponent, who's winning in every poll, (indiscernible) eventual election, upcoming next year, and is being prosecuted by the administration that he's seeking to replace. That is the frightening future. That is tailor-made to launch cycles of recrimination that will shake our Republic for the future.

JUDGE CHILDS: If you had the Impeachment Judgment Clause, as you indicate, indicate impeachment, then conviction but then the President either resigns, is removed and then later on is prosecuted for a different crime, can that happen or is there immunity there?

MR. SAUER: I'm not sure I understand the hypothetical. Could you say it again? I apologize.

JUDGE CHILDS: Just indicating that if you're resting on that there must be impeachment and conviction and it's for one set of crimes but then later on the President either removes -- is removed from office or resigns and later on there's a prosecution for something different, is there immunity for that later crime?

MR. SAUER: Yes. I think that's the better reason. Obviously, it's not presented in this case because we have a close match between the conduct, the underlying conduct or transaction/occurrence that's

alleged in the Articles of Impeachment of which there was an acquittal --

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an acquittal, right, which is the strongest case for double jeopardy and between the facts alleged in the indictment -- but if there were like, an unrelated prosecution --

JUDGE CHILDS: If you could answer my question, because --

MR. SAUER: Yes.

JUDGE CHILDS: -- you just made a statement about, he's only being prosecuted for crimes while in office, and so that's why I'm asking about leaving office and then thereafter being prosecuted for something different.

MR. SAUER: Under the plain text of the Constitution, the best reading would be he has to be impeached and convicted for the thing that he's subsequently prosecuted. So if he were impeached, convicted, and removed from office and they charge him with another official act that was unrelated to the impeachment, I think that what Chief Justice Marshall says in *Marbury* would still govern. I think that's -- obviously, it's not presented in this case. The Court doesn't have to decide it, but that'd be my answer.

JUDGE PAN: So I just want to confirm, your position is, if President Trump had been convicted after his impeachment trial on incitement of insurrection, if he'd been convicted, then this prosecution would be entirely proper?

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MR. SAUER: I would say that if he were impeached and convicted for the same and similar conduct, then that would authorize a subsequent prosecution. Obviously, we have many other issues with this prosecution. So I don't --

JUDGE PAN: So is that a yes, because I think you said in your brief that that impeachment for incitement of insurrection is based on the same or related conduct as that which is in the indictment? You said that.

MR. SAUER: Yes. Yes. Yes, I agree with that.

JUDGE PAN: So if he had been convicted by the Senate, then this prosecution would be entirely proper, correct?

MR. SAUER: No. I would not phrase it that way because there's lots of other problems with this prosecution that we've raised in extensive pleadings in the district court. He could be --

JUDGE PAN: Well, under --

MR. SAUER: -- prosecuted for --

JUDGE PAN: -- under the Impeachment Judgment Clause, if he had been convicted by the Senate when he was impeached for incitement of insurrection on same or related conduct as what's in the indictment, then this prosecution would be properly brought.

MR. SAUER: Yes, a prosecution could be properly brought, (indiscernible) this prosecution, which has tons of

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other problems with it. I just want to be very clear about that. I'm not making any concession that this prosecution is properly --

JUDGE PAN: All right. Let me try one more time. Under your interpretation of the Impeachment Judgment Clause, if President Trump had been convicted when he was previously impeached on same or related conduct as that which is in this indictment, the Government could properly prosecute him for that same or related conduct. Yes or no?

MR. SAUER: Potentially, provided they qualify it with all kinds of other legal doctrines that are violated in this case. So I admit that a prosecution could be --

JUDGE PAN: I'm only asking you, under your -- under your interpretation of the Impeachment Judgment Clause, is that proper? Is that allowed?

MR. SAUER: And I stand on my prior answer. I think we're agree --

JUDGE PAN: I understand there might be other reasons why you would challenge this prosecution. I'm saying, based on your interpretation of the Clause, this prosecution would be properly brought.

MR. SAUER: If a -- yes. I would not say this prosecution, be very clear about that --

JUDGE PAN: But it's a prosecution based on the same or related conduct.

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MR. SAUER: This prosecution, which has many other issues related to it -- what I would say is that the Impeachment Judgment Clause authorizes the prosecution of a President who's been impeached and convicted by the Senate, which President Trump was not.

JUDGE PAN: All right. We'll make it a hypothetical. Say a President was impeached and convicted on a charge of incitement of insurrection

that is under the same allegations as a criminal indictment; he's convicted. Then the Government could bring a prosecution for the same or related conduct, correct?

MR. SAUER: Don't disagree with that.

JUDGE PAN: Okay.

MR. SAUER: (Indiscernible.)

JUDGE PAN: And then that means that the conduct, that same or related, even if it's official, they -- he could be prosecuted for it, correct?

MR. SAUER: Only if he were impeached or convicted.

JUDGE PAN: Correct. Okay. Thank you.

JUDGE CHILDS: But my question goes to after the fact, and the reason I state that, even though you're challenging that these actions are only occurring while President, the district court's decision was that there is no presidential immunity from prosecution for official acts.

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It doesn't put a time frame in there, and so that's why I'm going to beyond. Your investigation, your prosecution might not come until later, after the President has left office. So are you telling us that we are limited to a time frame in answering this question?

MR. SAUER: I think the time frame is set forth by Chief Justice Marshall against -- *Marbury against Madison*, when he says never examinable by the courts. So unless there is that one gatekeeping incident that has to occur, which is impeachment and conviction, the official acts, the Court has no

jurisdiction to review them under the separation of powers and the Executive Vesting Clause.

JUDGE CHILDS: But that also assumes that an impeachment proceeding occurred if there is not one, because we discussed earlier that not all officials go through that process.

MR. SAUER: Absolutely.

JUDGE CHILDS: That's a judgment call --

MR. SAUER: Right. Right.

JUDGE CHILDS: -- as to whether that process would even be brought.

MR. SAUER: I would say we have two arguments that reinforce each other. So if there's no impeachment ever and no conviction, then the official acts are immune, period. Now, further, the Impeachment Judgment Clause incorporates a

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doctrine of, you know, a doctrine of double jeopardy that prohibits it, especially in the case of acquittal. So those are reinforcing doctrines that are set forth in the Constitution.

If there are no further questions, we'd ask the Court to reverse.

JUDGE HENDERSON: All right. Thank you.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRIMINAL NO.

UNITED STATES OF AMERICA

v.

DONALD J. TRUMP,

Defendant.

GRAND JURY ORIGINAL

VIOLATIONS:

Count 1: 18 U.S.C. § 371 (Conspiracy to Defraud the United States)

Count 2: 18 U.S.C. § 1512(k) (Conspiracy to Obstruct an Official Proceeding)

Count 3: 18 U.S.C. §§ 1512(c)(2), 2 (Obstruction of and Attempt to Obstruct an Official Proceeding)

Count 4: 18 U.S.C. § 241 (Conspiracy Against Rights)

INDICTMENT

The Grand Jury charges that, at all times material to this Indictment, on or about the dates and at the approximate times stated below:

INTRODUCTION

1. The Defendant, **DONALD J. TRUMP,** was the forty-fifth President of the United States and a

candidate for re-election in 2020. The Defendant lost the 2020 presidential election.

2. Despite having lost, the Defendant was determined to remain in power. So for more than two months following election day on November 3, 2020, the Defendant spread lies that there had been outcome-determinative fraud in the election and that he had actually won. These claims were false, and the Defendant knew that they were false. But the Defendant repeated and widely disseminated them anyway—to make his knowingly false claims appear legitimate, create an intense national atmosphere of mistrust and anger, and erode public faith in the administration of the election.

3. The Defendant had a right, like every American, to speak publicly about the election and even to claim, falsely, that there had been outcome-determinative fraud during the election and that he had won. He was also entitled to formally challenge the results of the election through lawful and appropriate means, such as by seeking recounts or audits of the popular vote in states or filing lawsuits challenging ballots and procedures. Indeed, in many cases, the Defendant did pursue these methods of contesting the election results. His efforts to change the outcome in any state through recounts, audits, or legal challenges were uniformly unsuccessful.

4. Shortly after election day, the Defendant also pursued unlawful means of discounting legitimate votes and subverting the election results. In so doing, the Defendant perpetrated three criminal conspiracies:

a. A conspiracy to defraud the United States by using dishonesty, fraud, and deceit to impair,

obstruct, and defeat the lawful federal government function by which the results of the presidential election are collected, counted, and certified by the federal government, in violation of 18 U.S.C. § 371;

b. A conspiracy to corruptly obstruct and impede the January 6 congressional proceeding at which the collected results of the presidential election are counted and certified ("the certification proceeding"), in violation of 18 U.S.C. § 1512(k); and

c. A conspiracy against the right to vote and to have one's vote counted, in violation of 18 U.S.C. § 241.

Each of these conspiracies—which built on the widespread mistrust the Defendant was creating through pervasive and destabilizing lies about election fraud—targeted a bedrock function of the United States federal government: the nation's process of collecting, counting, and certifying the results of the presidential election ("the federal government function").

COUNT ONE
(Conspiracy to Defraud the United States—18 U.S.C. § 371)

5. The allegations contained in paragraphs 1 through 4 of this Indictment are realleged and fully incorporated here by reference.

The Conspiracy

6. From on or about November 14, 2020, through on or about January 20, 2021, in the District of Columbia and elsewhere, the Defendant,

DONALD J. TRUMP,

did knowingly combine, conspire, confederate, and agree with co-conspirators, known and unknown to the Grand Jury, to defraud the United States by using dishonesty, fraud, and deceit to impair, obstruct, and defeat the lawful federal government function by which the results of the presidential election are collected, counted, and certified by the federal government.

Purpose of the Conspiracy

7. The purpose of the conspiracy was to overturn the legitimate results of the 2020 presidential election by using knowingly false claims of election fraud to obstruct the federal government function by which those results are collected, counted, and certified.

The Defendant's Co-Conspirators

8. The Defendant enlisted co-conspirators to assist him in his criminal efforts to overturn the legitimate results of the 2020 presidential election and retain power. Among these were:

a. Co-Conspirator 1, an attorney who was willing to spread knowingly false claims and pursue strategies that the Defendant's 2020 re-election campaign attorneys would not.

b. Co-Conspirator 2, an attorney who devised and attempted to implement a strategy to leverage the Vice President's ceremonial role overseeing the certification proceeding to obstruct the certification of the presidential election.

c. Co-Conspirator 3, an attorney whose unfounded claims of election fraud the Defendant privately acknowledged to others sounded "crazy." Nonetheless, the Defendant

embraced and publicly amplified Co-Conspirator 3's disinformation.

d. Co-Conspirator 4, a Justice Department official who worked on civil matters and who, with the Defendant, attempted to use the Justice Department to open sham election crime investigations and influence state legislatures with knowingly false claims of election fraud.

e. Co-Conspirator 5, an attorney who assisted in devising and attempting to implement a plan to submit fraudulent slates of presidential electors to obstruct the certification proceeding.

f. Co-Conspirator 6, a political consultant who helped implement a plan to submit fraudulent slates of presidential electors to obstruct the certification proceeding.

The Federal Government Function

9. The federal government function by which the results of the election for President of the United States are collected, counted, and certified was established through the Constitution and the Electoral Count Act (ECA), a federal law enacted in 1887. The Constitution provided that individuals called electors select the president, and that each state determine for itself how to appoint the electors apportioned to it. Through state laws, each of the fifty states and the District of Columbia chose to select their electors based on the popular vote in the state. After election day, the ECA required each state to formally determine—or "ascertain"—the electors who would represent the state's voters by casting electoral votes on behalf of the candidate who had won the popular vote, and required the executive of each state

to certify to the federal government the identities of those electors. Then, on a date set by the ECA, each state's ascertained electors were required to meet and collect the results of the presidential election—that is, to cast electoral votes based on their state's popular vote, and to send their electoral votes, along with the state executive's certification that they were the state's legitimate electors, to the United States Congress to be counted and certified in an official proceeding. Finally, the Constitution and ECA required that on the sixth of January following election day, the Congress meet in a Joint Session for a certification proceeding, presided over by the Vice President as President of the Senate, to count the electoral votes, resolve any objections, and announce the result—thus certifying the winner of the presidential election as president-elect. This federal government function—from the point of ascertainment to the certification—is foundational to the United States' democratic process, and until 2021, had operated in a peaceful and orderly manner for more than 130 years.

Manner and Means

10. The Defendant's conspiracy to impair, obstruct, and defeat the federal government function through dishonesty, fraud, and deceit included the following manner and means:

a. The Defendant and co-conspirators used knowingly false claims of election fraud to get state legislators and election officials to subvert the legitimate election results and change electoral votes for the Defendant's opponent, Joseph R. Biden, Jr., to electoral votes for the Defendant. That is, on the pretext of baseless fraud claims, the Defendant pushed officials in

certain states to ignore the popular vote; disenfranchise millions of voters; dismiss legitimate electors; and ultimately, cause the ascertainment of and voting by illegitimate electors in favor of the Defendant.

b. The Defendant and co-conspirators organized fraudulent slates of electors in seven targeted states (Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin), attempting to mimic the procedures that the legitimate electors were supposed to follow under the Constitution and other federal and state laws. This included causing the fraudulent electors to meet on the day appointed by federal law on which legitimate electors were to gather and cast their votes; cast fraudulent votes for the Defendant; and sign certificates falsely representing that they were legitimate electors. Some fraudulent electors were tricked into participating based on the understanding that their votes would be used only if the Defendant succeeded in outcome-determinative lawsuits within their state, which the Defendant never did. The Defendant and co-conspirators then caused these fraudulent electors to transmit their false certificates to the Vice President and other government officials to be counted at the certification proceeding on January 6.

c. The Defendant and co-conspirators attempted to use the power and authority of the Justice Department to conduct sham election crime investigations and to send a letter to the targeted states that falsely claimed that the Justice Department had identified significant

concerns that may have impacted the election outcome; that sought to advance the Defendant's fraudulent elector plan by using the Justice Department's authority to falsely present the fraudulent electors as a valid alternative to the legitimate electors; and that urged, on behalf of the Justice Department, the targeted states' legislatures to convene to create the opportunity to choose the fraudulent electors over the legitimate electors.

d. The Defendant and co-conspirators attempted to enlist the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results. First, using knowingly false claims of election fraud, the Defendant and co-conspirators attempted to convince the Vice President to use the Defendant's fraudulent electors, reject legitimate electoral votes, or send legitimate electoral votes to state legislatures for review rather than counting them. When that failed, on the morning of January 6, the Defendant and co-conspirators repeated knowingly false claims of election fraud to gathered supporters, falsely told them that the Vice President had the authority to and might alter the election results, and directed them to the Capitol to obstruct the certification proceeding and exert pressure on the Vice President to take the fraudulent actions he had previously refused.

e. After it became public on the afternoon of January 6 that the Vice President would not fraudulently alter the election results, a large and angry crowd— including many individuals

whom the Defendant had deceived into believing the Vice President could and might change the election results— violently attacked the Capitol and halted the proceeding. As violence ensued, the Defendant and co-conspirators exploited the disruption by redoubling efforts to levy false claims of election fraud and convince Members of Congress to further delay the certification based on those claims.

The Defendant's Knowledge of the Falsity of His Election Fraud Claims

11. The Defendant, his co-conspirators, and their agents made knowingly false claims that there had been outcome-determinative fraud in the 2020 presidential election. These prolific lies about election fraud included dozens of specific claims that there had been substantial fraud in certain states, such as that large numbers of dead, non-resident, non-citizen, or otherwise ineligible voters had cast ballots, or that voting machines had changed votes for the Defendant to votes for Biden. These claims were false, and the Defendant knew that they were false. In fact, the Defendant was notified repeatedly that his claims were untrue—often by the people on whom he relied for candid advice on important matters, and who were best positioned to know the facts— and he deliberately disregarded the truth. For instance:

a. The Defendant's Vice President—who personally stood to gain by remaining in office as part of the Defendant's ticket and whom the Defendant asked to study fraud allegations—told the Defendant that he had seen no evidence of outcome-determinative fraud.

b. The senior leaders of the Justice Department—appointed by the Defendant and responsible for investigating credible allegations of election crimes—told the Defendant on multiple occasions that various allegations of fraud were unsupported.

c. The Director of National Intelligence—the Defendant's principal advisor on intelligence matters related to national security—disabused the Defendant of the notion that the Intelligence Community's findings regarding foreign interference would change the outcome of the election.

d. The Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA")—whose existence the Defendant signed into law to protect the nation's cybersecurity infrastructure from attack—joined an official multi-agency statement that there was no evidence any voting system had been compromised and that declared the 2020 election "the most secure in American history." Days later, after the CISA Director—whom the Defendant had appointed—announced publicly that election security experts were in agreement that claims of computer-based election fraud were unsubstantiated, the Defendant fired him.

e. Senior White House attorneys—selected by the Defendant to provide him candid advice—informed the Defendant that there was no evidence of outcome-determinative election fraud, and told him that his presidency would end on Inauguration Day in 2021.

f. Senior staffers on the Defendant's 2020 re-election campaign ("Defendant's Campaign" or "Campaign")—whose sole mission was the Defendant's reelection—told the Defendant on November 7, 2020, that he had only a five to ten percent chance of prevailing in the election, and that success was contingent on the Defendant winning ongoing vote counts or litigation in Arizona, Georgia, and Wisconsin. Within a week of that assessment, the Defendant lost in Arizona—meaning he had lost the election.

g. State legislators and officials—many of whom were the Defendant's political allies, had voted for him, and wanted him to be re-elected— repeatedly informed the Defendant that his claims of fraud in their states were unsubstantiated or false and resisted his pressure to act based upon them.

h. State and federal courts—the neutral arbiters responsible for ensuring the fair and even-handed administration of election laws—rejected every outcome-determinative post-election lawsuit filed by the Defendant, his coconspirators, and allies, providing the Defendant real-time notice that his allegations were meritless.

12. The Defendant widely disseminated his false claims of election fraud for months, despite the fact that he knew, and in many cases had been informed directly, that they were not true. The Defendant's knowingly false statements were integral to his criminal plans to defeat the federal government function, obstruct the certification, and interfere with others' right to vote and have their votes counted. He made these knowingly false claims throughout the

post-election time period, including those below that he made immediately before the attack on the Capitol on January 6:

> a. The Defendant insinuated that more than ten thousand dead voters had voted in Georgia. Just four days earlier, Georgia's Secretary of State had explained to the Defendant that this was false.
>
> b. The Defendant asserted that there had been 205,000 more votes than voters in Pennsylvania. The Defendant's Acting Attorney General and Acting Deputy Attorney General had explained to him that this was false.
>
> c. The Defendant said that there had been a suspicious vote dump in Detroit, Michigan. The Defendant's Attorney General had explained to the Defendant that this was false, and the Defendant's allies in the Michigan state legislature—the Speaker of the House of Representatives and Majority Leader of the Senate—had publicly announced that there was no evidence of substantial fraud in the state.
>
> d. The Defendant claimed that there had been tens of thousands of double votes and other fraud in Nevada. The Nevada Secretary of State had previously rebutted the Defendant's fraud claims by publicly posting a "Facts vs. Myths" document explaining that Nevada judges had reviewed and rejected them, and the Nevada Supreme Court had rendered a decision denying such claims.

e. The Defendant said that more than 30,000 non-citizens had voted in Arizona. The Defendant's own Campaign Manager had explained to him that such claims were false, and the Speaker of the Arizona House of Representatives, who had supported the Defendant in the election, had issued a public statement that there was no evidence of substantial fraud in Arizona.

f. The Defendant asserted that voting machines in various contested states had switched votes from the Defendant to Biden. The Defendant's Attorney General, Acting Attorney General, and Acting Deputy Attorney General all had explained to him that this was false, and numerous recounts and audits had confirmed the accuracy of voting machines.

The Criminal Agreement and Acts to Effect the Object of the Conspiracy

The Defendant's Use of Deceit to Get State Officials to Subvert the Legitimate Election Results and Change Electoral Votes

13. Shortly after election day—which fell on November 3, 2020—the Defendant launched his criminal scheme. On November 13, the Defendant's Campaign attorneys conceded in court that he had lost the vote count in the state of Arizona—meaning, based on the assessment the Defendant's Campaign advisors had given him just a week earlier, the Defendant had lost the election. So the next day, the Defendant turned to Co-Conspirator 1, whom he announced would spearhead his efforts going forward to challenge the election results. From that point on, the Defendant and his co-conspirators executed a

strategy to use knowing deceit in the targeted states to impair, obstruct, and defeat the federal government function, including as described below.

Arizona

14. On November 13, 2020, the Defendant had a conversation with his Campaign Manager, who informed him that a claim that had been circulating, that a substantial number of non-citizens had voted in Arizona, was false.

15. On November 22, eight days before Arizona's Governor certified the ascertainment of the state's legitimate electors based on the popular vote, the Defendant and Co-Conspirator 1 called the Speaker of the Arizona House of Representatives and made knowingly false claims of election fraud aimed at interfering with the ascertainment of and voting by Arizona's electors, as follows:

> a. The Defendant and Co-Conspirator 1 falsely asserted, among other things, that a substantial number of non-citizens, non-residents, and dead people had voted fraudulently in Arizona. The Arizona House Speaker asked Co- Conspirator 1 for evidence of the claims, which Co-Conspirator 1 did not have, but claimed he would provide. Co-Conspirator 1 never did so.
>
> b. The Defendant and Co-Conspirator 1 asked the Arizona House Speaker to call the legislature into session to hold a hearing based on their claims of election fraud. The Arizona House Speaker refused, stating that doing so would require a two-thirds vote of its members, and he would not allow it without actual evidence of fraud.

> c. The Defendant and Co-Conspirator 1 asked the Arizona House Speaker to use the legislature to circumvent the process by which legitimate electors would be ascertained for Biden based on the popular vote, and replace those electors with a new slate for the Defendant. The Arizona House Speaker refused, responding that the suggestion was beyond anything he had ever heard or thought of as something within his authority.

16. On December 1, Co-Conspirator 1 met with the Arizona House Speaker. When the Arizona House Speaker again asked Co-Conspirator 1 for evidence of the outcome-determinative election fraud he and the Defendant had been claiming, Co-Conspirator 1 responded with words to the effect of, "We don't have the evidence, but we have lots of theories."

17. On December 4, the Arizona House Speaker issued a public statement that said, in part:

> No election is perfect, and if there were evidence of illegal votes or an improper count, then Arizona law provides a process to contest the election: a lawsuit under state law. But the law does not authorize the Legislature to reverse the results of an election.
>
> As a conservative Republican, I don't like the results of the presidential election. I voted for President Trump and worked hard to reelect him. But I cannot and will not entertain a suggestion that we violate current law to change the outcome of a certified election.
>
> I and my fellow legislators swore an oath to support the U.S. Constitution and the constitution and laws of the state of Arizona. It

> would violate that oath, the basic principles of republican government, and the rule of law if we attempted to nullify the people's vote based on unsupported theories of fraud. Under the laws that we wrote and voted upon, Arizona voters choose who wins, and our system requires that their choice be respected.

18. On the morning of January 4, 2021, Co-Conspirator 2 called the Arizona House Speaker to urge him to use a majority of the legislature to decertify the state's legitimate electors. Arizona's validly ascertained electors had voted three weeks earlier and sent their votes to Congress, which was scheduled to count those votes in Biden's favor in just two days' time at the January 6 certification proceeding. When the Arizona House Speaker explained that state investigations had uncovered no evidence of substantial fraud in the state, Co-Conspirator 2 conceded that he "[didn't] know enough about facts on the ground" in Arizona, but nonetheless told the Arizona House Speaker to decertify and "let the courts sort it out." The Arizona House Speaker refused, stating that he would not "play with the oath" he had taken to uphold the United States Constitution and Arizona law.

19. On January 6, the Defendant publicly repeated the knowingly false claim that 36,000 non-citizens had voted in Arizona.

Georgia

20. On November 16, 2020, on the Defendant's behalf, his executive assistant sent Co- Conspirator 3 and others a document containing bullet points critical of a certain voting machine company, writing, "See attached - Please include as is, or almost as is, in

lawsuit." Co-Conspirator 3 responded nine minutes later, writing, "IT MUST GO IN ALL SUITS IN GA AND PA IMMEDIATELY WITH A FRAUD CLAIM THAT REQUIRES THE ENTIRE ELECTION TO BE SET ASIDE in those states and machines impounded for non-partisan professional inspection." On November 25, Co-Conspirator 3 filed a lawsuit against the Governor of Georgia falsely alleging "massive election fraud" accomplished through the voting machine company's election software and hardware. Before the lawsuit was even filed, the Defendant retweeted a post promoting it. The Defendant did this despite the fact that when he had discussed Co-Conspirator 3's far-fetched public claims regarding the voting machine company in private with advisors, the Defendant had conceded that they were unsupported and that Co-Conspirator 3 sounded "crazy." Co-Conspirator 3's Georgia lawsuit was dismissed on December 7.

21. On December 3, Co-Conspirator 1 orchestrated a presentation to a Judiciary Subcommittee of the Georgia State Senate, with the intention of misleading state senators into blocking the ascertainment of legitimate electors. During the presentation:

> a. An agent of the Defendant and Co-Conspirator 1 falsely claimed that more than 10,000 dead people voted in Georgia. That afternoon, a Senior Advisor to the Defendant told the Defendant's Chief of Staff through text messages, "Just an FYI . [A Campaign lawyer] and his team verified that the 10k+ supposed dead people voting in GA is not accurate. . . . It was alleged in [Co-Conspirator l's] hearing

today." The Senior Advisor clarified that he believed that the actual number was 12.

b. Another agent of the Defendant and Co-Conspirator 1 played a misleading excerpt of a video recording of ballot-counting at State Farm Arena in Atlanta and insinuated that it showed election workers counting "suitcases" of illegal ballots.

c. Co-Conspirator 2 encouraged the legislators to decertify the state's legitimate electors based on false allegations of election fraud.

22. Also on December 3, the Defendant issued a Tweet amplifying the knowingly false claims made in Co-Conspirator 1 's presentation in Georgia: "Wow! Blockbuster testimony taking place right now in Georgia. Ballot stuffing by Dems when Republicans were forced to leave the large counting room. Plenty more coming, but this alone leads to an easy win of the State!"

23. On December 4, the Georgia Secretary of State's Chief Operating Officer debunked the claims made at Co-Conspirator 1 's presentation the previous day, issuing a Tweet stating, "The 90 second video of election workers at State Farm arena, purporting to show fraud was watched in its entirety (hours) by @GaSecofState investigators. Shows normal ballot processing. Here is the fact check on it." On December 7, he reiterated during a press conference that the claim that there had been misconduct at State Farm Arena was false.

24. On December 8, the Defendant called the Georgia Attorney General to pressure him to support an election lawsuit filed in the Supreme Court by another state's attorney general. The Georgia

Attorney General told the Defendant that officials had investigated various claims of election fraud in the state and were not seeing evidence to support them.

25. Also on December 8, a Senior Campaign Advisor—who spoke with the Defendant on a daily basis and had informed him on multiple occasions that various fraud claims were untrue—expressed frustration that many of Co-Conspirator 1 and his legal team's claims could not be substantiated. As early as mid-November, for instance, the Senior Campaign Advisor had informed the Defendant that his claims of a large number of dead voters in Georgia were untrue. With respect to the persistent false claim regarding State Farm Arena, on December 8, the Senior Campaign Advisor wrote in an email, "When our research and campaign legal team can't back up any of the claims made by our Elite Strike Force Legal Team, you can see why we're 0-32 on our cases. I'll obviously hustle to help on all fronts, but it's tough to own any of this when it's all just conspiracy shit beamed down from the mothership."

26. On December 10, four days before Biden's validly ascertained electors were scheduled to cast votes and send them to Congress, Co-Conspirator 1 appeared at a hearing before the Georgia House of Representatives' Government Affairs Committee. Co-Conspirator 1 played the State Farm Arena video again, and falsely claimed that it showed "voter fraud right in front of people's eyes" and was "the tip of the iceberg." Then, he cited two election workers by name, baselessly accused them of "quite obviously surreptitiously passing around USB ports as if they are vials of heroin or cocaine," and suggested that they were criminals whose "places of work, their homes, should have been searched for evidence of ballots, for

evidence of USB ports, for evidence of voter fraud." Thereafter, the two election workers received numerous death threats.

27. On December 15, the Defendant summoned the incoming Acting Attorney General, the incoming Acting Deputy Attorney General, and others to the Oval Office to discuss allegations of election fraud. During the meeting, the Justice Department officials specifically refuted the Defendant's claims about State Farm Arena, explaining to him that the activity shown on the tape Co-Conspirator 1 had used was "benign."

28. On December 23, a day after the Defendant's Chief of Staff personally observed the signature verification process at the Cobb County Civic Center and notified the Defendant that state election officials were "conducting themselves in an exemplary fashion" and would find fraud if it existed, the Defendant tweeted that the Georgia officials administering the signature verification process were trying to hide evidence of election fraud and were "[t]errible people!"

29. In a phone call on December 27, the Defendant spoke with the Acting Attorney General and Acting Deputy Attorney General. During the call, the Defendant again pressed the unfounded claims regarding State Farm Arena, and the two top Justice Department officials again rebutted the allegations, telling him that the Justice Department had reviewed videotape and interviewed witnesses, and had not identified any suspicious conduct.

30. On December 31, the Defendant signed a verification affirming false election fraud allegations made on his behalf in a lawsuit filed in his name

against the Georgia Governor. In advance of the filing, Co-Conspirator 2—who was advising the Defendant on the lawsuit— acknowledged in an email that he and the Defendant had, since signing a previous verification, "been made aware that some of the allegations (and evidence proffered by the experts) has been inaccurate" and that signing a new affirmation "with that knowledge (and incorporation by reference) would not be accurate." The Defendant and Co-Conspirator 2 caused the Defendant's signed verification to be filed nonetheless.

31. On January 2, four days before Congress's certification proceeding, the Defendant and others called Georgia's Secretary of State. During the call, the Defendant lied to the Georgia Secretary of State to induce him to alter Georgia's popular vote count and call into question the validity of the Biden electors' votes, which had been transmitted to Congress weeks before, including as follows:

> a. The Defendant raised allegations regarding the State Farm Arena video and repeatedly disparaged one of the same election workers that Co- Conspirator 1 had maligned on December 10, using her name almost twenty times and falsely referring to her as "a professional vote scammer and hustler." In response, the Georgia Secretary of State refuted this: "You're talking about the State Farm video. And I think it's extremely unfortunate that [Co-Conspirator 1] or his people, they sliced and diced that video and took it out of context." When the Georgia Secretary of State then offered a link to a video that would disprove Co-Conspirator l's claims, the Defendant responded, "I don't care about a

link, I don't need it. I have a much, [Georgia Secretary of State], I have a much better link."

b. The Defendant asked about rumors that paper ballots cast in the election were being destroyed, and the Georgia Secretary of State's Counsel explained to him that the claim had been investigated and was not true.

c. The Defendant claimed that 5,000 dead people voted in Georgia, causing the Georgia Secretary of State to respond, "Well, Mr. President, the challenge that you have is the data you have is wrong.... The actual number were two. Two. Two people that were dead that voted. And so [your information]'s wrong, that was two."

d. The Defendant claimed that thousands of out-of-state voters had cast ballots in Georgia's election, which the Georgia Secretary of State's Counsel refuted, explaining, "We've been going through each of those as well, and those numbers that we got, that [Defendant's counsel] was just saying, they're not accurate. Every one we've been through are people that lived in Georgia, moved to a different state, but then moved back to Georgia legitimately . . . they moved back in years ago. This was not like something just before the election."

e. In response to multiple other of the Defendant's allegations, the Georgia Secretary of State's Counsel told the Defendant that the Georgia Bureau of Investigation was examining all such claims and finding no merit to them.

> f. The Defendant said that he needed to "find" 11,780 votes, and insinuated that the Georgia Secretary of State and his Counsel could be subject to criminal prosecution if they failed to find election fraud as he demanded, stating, "And you are going to find that they are—which is totally illegal— it's, it's, it's more illegal for you than it is for them because you know what they did and you're not reporting it. That's a criminal, you know, that's a criminal offense. And you know, you can't let that happen. That's a big risk to you and to [the Georgia Secretary of State's Counsel], your lawyer."

32. The next day, on January 3, the Defendant falsely claimed that the Georgia Secretary of State had not addressed the Defendant's allegations, publicly stating that the Georgia Secretary of State "was unwilling, or unable, to answer questions such as the 'ballots under table' scam, ballot destruction, out of state 'voters', dead voters, and more. He has no clue!"

33. On January 6, the Defendant publicly repeated the knowingly false insinuation that more than 10,300 dead people had voted in Georgia.

Michigan

34. On November 5, 2020, the Defendant claimed that there had been a suspicious dump of votes—purportedly illegitimate ballots—stating, "In Detroit, there were hours of unexplained delay in delivering many of the votes for counting. The final batch did not arrive until four in the morning and—even though the polls closed at eight o'clock. So they brought it in, and the batches came in, and nobody knew where they came from."

35. On November 20, three days before Michigan's Governor signed a certificate of ascertainment notifying the federal government that, based on the popular vote, Biden's electors were to represent Michigan's voters, the Defendant held a meeting in the Oval Office with the Speaker of the Michigan House of Representatives and the Majority Leader of the Michigan Senate. In the meeting, the Defendant raised his false claim, among others, of an illegitimate vote dump in Detroit. In response, the Michigan Senate Majority Leader told the Defendant that he had lost Michigan not because of fraud, but because the Defendant had underperformed with certain voter populations in the state. Upon leaving their meeting, the Michigan House Speaker and Michigan Senate Majority Leader issued a statement reiterating this:

> The Senate and House Oversight Committees are actively engaged in a thorough review of Michigan's elections process and we have faith in the committee process to provide greater transparency and accountability to our citizens. We have not yet been made aware of any information that would change the outcome of the election in Michigan and as legislative leaders, we will follow the law and follow the normal process regarding Michigan's electors, just as we have said throughout this election.

36. On December 1, the Defendant raised his Michigan vote dump claim with the Attorney General, who responded that what had occurred in Michigan had been the normal vote-counting process and that there was no indication of fraud in Detroit.

37. Despite this, the next day, the Defendant made a knowingly false statement that in Michigan, "[a]t 6:31 in the morning, a vote dump of 149,772 votes

came in unexpectedly. We were winning by a lot. That batch was received in horror. Nobody knows anything about it. . . . It's corrupt. Detroit is corrupt. I have a lot of friends in Detroit. They know it. But Detroit is totally corrupt."

38. On December 4, Co-Conspirator 1 sent a text message to the Michigan House Speaker reiterating his unsupported claim of election fraud and attempting to get the Michigan House Speaker to assist in reversing the ascertainment of the legitimate Biden electors, stating, "Looks like Georgia may well hold some factual hearings and change the certification under ArtII sec 1 cl 2 of the Constitution. As [Co-Conspirator 2] explained they don't just have the right to do it but the obligation. ... Help me get this done in Michigan."

39. Similarly, on December 7, despite still having established no fraud in Michigan, Co-Conspirator 1 sent a text intended for the Michigan Senate Majority Leader: "So I need you to pass a joint resolution from the Michigan legislature that states that, * the election is in dispute, * there's an ongoing investigation by the Legislature, and * the Electors sent by Governor Whitmer are not the official Electors of the State of Michigan and do not fall within the Safe Harbor deadline of Dec 8 under Michigan law."

40. On December 14—the day that electors in states across the country were required to vote and submit their votes to Congress—the Michigan House Speaker and Michigan Senate Majority Leader announced that, contrary to the Defendant's requests, they would not decertify the legitimate election results or electors in Michigan. The Michigan Senate Majority Leader's public statement included, "[W]e have not received evidence of fraud on a scale that

would change the outcome of the election in Michigan." The Michigan House Speaker's public statement read, in part:

> We've diligently examined these reports of fraud to the best of our ability. . . .
>
> . . . I fought hard for President Trump. Nobody wanted him to win more than me. I think he's done an incredible job. But I love our republic, too. I can't fathom risking our norms, traditions and institutions to pass a resolution retroactively changing the electors for Trump, simply because some think there may have been enough widespread fraud to give him the win. That's unprecedented for good reason. And that's why there is not enough support in the House to cast a new slate of electors. I fear we'd lose our country forever. This truly would bring mutually assured destruction for every future election in regards to the Electoral College. And I can't stand for that. I won't.

41. On January 6, 2021, the Defendant publicly repeated his knowingly false claim regarding an illicit dump of more than a hundred thousand ballots in Detroit.

Pennsylvania

42. On November 11, 2020, the Defendant publicly maligned a Philadelphia City Commissioner for stating on the news that there was no evidence of widespread fraud in Philadelphia. As a result, the Philadelphia City Commissioner and his family received death threats.

43. On November 25, the day after Pennsylvania's Governor signed a certificate of ascertainment and thus certified to the federal government that Biden's

electors were the legitimate electors for the state, Co-Conspirator 1 orchestrated an event at a hotel in Gettysburg attended by state legislators. Co-Conspirator 1 falsely claimed that Pennsylvania had issued 1.8 million absentee ballots and received 2.5 million in return. In the days thereafter, a Campaign staffer wrote internally that Co-Conspirator l's allegation was "just wrong" and "[t]here's no way to defend it." The Deputy Campaign Manager responded, "We have been saying this for a while. It's very frustrating."

44. On December 4, after four Republican leaders of the Pennsylvania legislature issued a public statement that the General Assembly lacked the authority to overturn the popular vote and appoint its own slate of electors, and that doing so would violate the state Election Code and Constitution, the Defendant re-tweeted a post labeling the legislators cowards.

45. On December 31 and January 3, the Defendant repeatedly raised with the Acting Attorney General and Acting Deputy Attorney General the allegation that in Pennsylvania, there had been 205,000 more votes than voters. Each time, the Justice Department officials informed the Defendant that his claim was false.

46. On January 6, 2021, the Defendant publicly repeated his knowingly false claim that there had been 205,000 more votes than voters in Pennsylvania.

Wisconsin

47. On November 29,2020, a recount in Wisconsin that the Defendant's Campaign had petitioned and paid for did not change the election result, and in fact increased the Defendant's margin of defeat.

48. On December 14, the Wisconsin Supreme Court rejected an election challenge by the Campaign. One Justice wrote, "[N]othing in this case casts any legitimate doubt that the people of Wisconsin lawfully chose Vice President Biden and Senator Harris to be the next leaders of our great country."

49. On December 21, as a result of the state Supreme Court's decision, the Wisconsin Governor—who had signed a certificate of ascertainment on November 30 identifying Biden's electors as the state's legitimate electors—signed a certificate of final determination in which he recognized that the state Supreme Court had resolved a controversy regarding the appointment of Biden's electors, and confirmed that Biden had received the highest number of votes in the state and that his electors were the state's legitimate electors.

50. That same day, in response to the court decision that had prompted the Wisconsin Governor to sign a certificate of final determination, the Defendant issued a Tweet repeating his knowingly false claim of election fraud and demanding that the Wisconsin legislature overturn the election results that had led to the ascertainment of Biden's electors as the legitimate electors.

51. On December 27, the Defendant raised with the Acting Attorney General and Acting Deputy Attorney General a specific fraud claim—that there had been more votes than voters in Wisconsin. The Acting Deputy Attorney General informed the Defendant that the claim was false.

52. On January 6, 2021, the Defendant publicly repeated knowingly false claims that there had been tens of thousands of unlawful votes in Wisconsin.

The Defendants Use of Dishonesty, Fraud, and Deceit to Organize Fraudulent Slates of Electors and Cause Them to Transmit False Certificates to Congress

53. As the Defendant's attempts to obstruct the electoral vote through deceit of state officials met with repeated failure, beginning in early December 2020, he and co-conspirators developed a new plan: to marshal individuals who would have served as the Defendant's electors, had he won the popular vote, in seven targeted states—Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin—and cause those individuals to make and send to the Vice President and Congress false certifications that they were legitimate electors. Under the plan, the submission of these fraudulent slates would create a fake controversy at the certification proceeding and position the Vice President—presiding on January 6 as President of the Senate—to supplant legitimate electors with the Defendant's fake electors and certify the Defendant as president.

54. The plan capitalized on ideas presented in memoranda drafted by Co-Conspirator 5, an attorney who was assisting the Defendant's Campaign with legal efforts related to a recount in Wisconsin. The memoranda evolved over time from a legal strategy to preserve the Defendant's rights to a corrupt plan to subvert the federal government function by stopping Biden electors' votes from being counted and certified, as follows:

a. The November 18 Memorandum ("Wisconsin Memo") advocated that, because of the ongoing recount in Wisconsin, the Defendant's electors there should meet and cast votes on December 14—the date the ECA required appointed

electors to vote—to preserve the alternative of the Defendant's Wisconsin elector slate in the event the Defendant ultimately prevailed in the state.

b. The December 6 Memorandum ("Fraudulent Elector Memo") marked a sharp departure from Co-Conspirator 5's Wisconsin Memo, advocating that the alternate electors originally conceived of to preserve rights in Wisconsin instead be used in a number of states as fraudulent electors to prevent Biden from receiving the 270 electoral votes necessary to secure the presidency on January 6. The Fraudulent Elector Memo suggested that the Defendant's electors in six purportedly "contested" states (Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin) should meet and mimic as best as possible the actions of the legitimate Biden electors, and that on January 6, the Vice President should open and count the fraudulent votes, setting up a fake controversy that would derail the proper certification of Biden as president-elect.

c. The December 9 Memorandum ("Fraudulent Elector Instructions") consisted of Co-Conspirator 5's instructions on how fraudulent electors could mimic legitimate electors in Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin. Co-Conspirator 5 noted that in some states, it would be virtually impossible for the fraudulent electors to successfully take the same steps as the legitimate electors because state law required formal participation in the process by state officials, or access to official resources.

55. The plan began in early December, and ultimately, the conspirators and the Defendant's Campaign took the Wisconsin Memo and expanded it to any state that the Defendant claimed was "contested"—even New Mexico, which the Defendant had lost by more than ten percent of the popular vote. This expansion was forecast by emails the Defendant's Chief of Staff sent on December 6, forwarding the Wisconsin Memo to Campaign staff and writing, "We just need to have someone coordinating the electors for states."

56. On December 6, the Defendant and Co-Conspirator 2 called the Chairwoman of the Republican National Committee to ensure that the plan was in motion. During the call, Co-Conspirator 2 told the Chairwoman that it was important for the RNC to help the Defendant's Campaign gather electors in targeted states, and falsely represented to her that such electors' votes would be used only if ongoing litigation in one of the states changed the results in the Defendant's favor. After the RNC Chairwoman consulted the Campaign and heard that work on gathering electors was underway, she called and reported this information to the Defendant, who responded approvingly.

57. On December 7, Co-Conspirator 1 received the Wisconsin Memo and the Fraudulent Elector Memo. Co-Conspirator 1 spoke with Co-Conspirator 6 regarding attorneys who could assist in the fraudulent elector effort in the targeted states, and he received from Co- Conspirator 6 an email identifying attorneys in Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin.

58. The next day, on December 8, Co-Conspirator 5 called the Arizona attorney on Co-Conspirator 6's

list. In an email after the call, the Arizona attorney recounted his conversation with Co-Conspirator 5 as follows:

> I just talked to the gentleman who did that memo, [Co- Conspirator 5]. His idea is basically that all of us (GA, WI, AZ, PA, etc.) have our electors send in their votes (even though the votes aren't legal under federal law -- because they're not signed by the Governor); so that members of Congress can fight about whether they should be counted on January 6th. (They could potentially argue that they're not bound by federal law because they're Congress and make the law, etc.) Kind of wild/creative -- I'm happy to discuss. My comment to him was that I guess there's no harm in it, (legally at least) -- i.e. we would just be sending in "fake" electoral votes to Pence so that "someone" in Congress can make an objection when they start counting votes, and start arguing that the "fake" votes should be counted.

59. At Co-Conspirator 1 's direction, on December 10, Co-Conspirator 5 sent to points of contact in all targeted states except Wisconsin (which had already received his memos) and New Mexico a streamlined version of the Wisconsin Memo—which did not reveal the intended fraudulent use of the Defendant's electors—and the Fraudulent Elector Instructions, along with fraudulent elector certificates that he had drafted.

60. The next day, on December 11, through Co-Conspirator 5, Co-Conspirator 1 suggested that the Arizona lawyer file a petition for certiorari in the Supreme Court as a pretext to claim that litigation was pending in the state, to provide cover for the

convening and voting of the Defendant's fraudulent electors there. Co-Conspirator 5 explained that Co-Conspirator 1 had heard from a state official and state provisional elector that "it could appear **treasonous** for the AZ electors to vote on Monday if there is no pending court proceeding . . . ."

61. To manage the plan in Pennsylvania, on December 12, Co-Conspirator 1, Co- Conspirator 5, and Co-Conspirator 6 participated in a conference call organized by the Defendant's Campaign with the Defendant's electors in that state. When the Defendant's electors expressed concern about signing certificates representing themselves as legitimate electors, Co-Conspirator 1 falsely assured them that their certificates would be used only if the Defendant succeeded in litigation. Subsequently, Co-Conspirator 6 circulated proposed conditional language to that effect for potential inclusion in the fraudulent elector certificates. A Campaign official cautioned not to offer the conditional language to other states because "[t]he other States are signing what he prepared -- if it gets out we changed the language for PA it could snowball." In some cases, the Defendant's electors refused to participate in the plan.

62. On December 13, Co-Conspirator 5 sent Co-Conspirator 1 an email memorandum that further confirmed that the conspirators' plan was not to use the fraudulent electors only in the circumstance that the Defendant's litigation was successful in one of the targeted states—instead, the plan was to falsely present the fraudulent slates as an alternative to the legitimate slates at Congress's certification proceeding.

63. On December 13, the Defendant asked the Senior Campaign Advisor for an update on "what was

going on" with the elector plan and directed him to "put out [a] statement on electors." As a result, Co-Conspirator 1 directed the Senior Campaign Advisor to join a conference call with him, Co-Conspirator 6, and others. When the Senior Campaign Advisor related these developments in text messages to the Deputy Campaign Manager, a Senior Advisor to the Defendant, and a Campaign staffer, the Deputy Campaign Manager responded, "Here's the thing the way this has morphed it's a crazy play so I don't know who wants to put their name on it." The Senior Advisor wrote, "Certifying illegal votes." In turn, the participants in the group text message refused to have a statement regarding electors attributed to their names because none of them could "stand by it."

64. Also on December 13, at a Campaign staffer's request, Co-Conspirator 5 drafted and sent fraudulent elector certificates for the Defendant's electors in New Mexico, which had not previously been among the targeted states, and where there was no pending litigation on the Defendant's behalf. The next day, the Defendant's Campaign filed an election challenge suit in New Mexico at 11:54 a.m., six minutes before the noon deadline for the electors' votes, as a pretext so that there was pending litigation there at the time the fraudulent electors voted.

65. On December 14, the legitimate electors of all 50 states and the District of Columbia met in their respective jurisdictions to formally cast their votes for president, resulting in a total of 232 electoral votes for the Defendant and 306 for Biden. The legitimate electoral votes that Biden won in the states that the Defendant targeted, and the Defendant's margin of defeat, were as follows: Arizona (11 electoral votes; 10,457 votes), Georgia (16 electoral votes; 11,779

votes), Michigan (16 electoral votes; 154,188 votes), Nevada (6 electoral votes; 33,596 votes), New Mexico (5 electoral votes; 99,720 votes), Pennsylvania (20 electoral votes; 80,555 votes), and Wisconsin (10 electoral votes; 20,682 votes).

66. On the same day, at the direction of the Defendant and Co-Conspirator 1, fraudulent electors convened sham proceedings in the seven targeted states to cast fraudulent electoral ballots in favor of the Defendant. In some states, in order to satisfy legal requirements set forth for legitimate electors under state law, state officials were enlisted to provide the fraudulent electors access to state capitol buildings so that they could gather and vote there. In many cases, however, as Co-Conspirator 5 had predicted in the Fraudulent Elector Instructions, the fraudulent electors were unable to satisfy the legal requirements.

67. Nonetheless, as directed in the Fraudulent Elector Instructions, shortly after the fraudulent electors met on December 14, the targeted states' fraudulent elector certificates were mailed to the President of the Senate, the Archivist of the United States, and others. The Defendant and co-conspirators ultimately used the certificates of these fraudulent electors to deceitfully target the government function, and did so contrary to how fraudulent electors were told they would be used.

68. Unlike those of the fraudulent electors, consistent with the ECA, the legitimate electors' signed certificates were annexed to the state executives' certificates of ascertainment before being sent to the President of the Senate and others.

69. That evening, at 6:26 p.m., the RNC Chairwoman forwarded to the Defendant, through his

executive assistant, an email titled, "Electors Recap -- Final," which represented that in "Six Contested States"—Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin—the Defendant's electors had voted in parallel to Biden's electors. The Defendant's executive assistant responded, "It's in front of him!"

The Defendant's Attempt to Leverage the Justice Department to Use Deceit to Get State Officials to Replace Legitimate Electors and Electoral Votes with the Defendant's

70. In late December 2020, the Defendant attempted to use the Justice Department to make knowingly false claims of election fraud to officials in the targeted states through a formal letter under the Acting Attorney General's signature, thus giving the Defendant's lies the backing of the federal government and attempting to improperly influence the targeted states to replace legitimate Biden electors with the Defendant's.

71. On December 22, the Defendant met with Co-Conspirator 4 at the White House. Co-Conspirator 4 had not informed his leadership at the Justice Department of the meeting, which was a violation of the Justice Department's written policy restricting contacts with the White House to guard against improper political influence.

72. On December 26, Co-Conspirator 4 spoke on the phone with the Acting Attorney General and lied about the circumstances of his meeting with the Defendant at the White House, falsely claiming that the meeting had been unplanned. The Acting Attorney General directed Co-Conspirator 4 not to

have unauthorized contacts with the White House again, and Co-Conspirator 4 said he would not.

73. The next morning, on December 27, contrary to the Acting Attorney General's direction, Co-Conspirator 4 spoke with the Defendant on the Defendant's cell phone for nearly three minutes.

74. That afternoon, the Defendant called the Acting Attorney General and Acting Deputy Attorney General and said, among other things, "People tell me [Co-Conspirator 4] is great. I should put him in." The Defendant also raised multiple false claims of election fraud, which the Acting Attorney General and Acting Deputy Attorney General refuted. When the Acting Attorney General told the Defendant that the Justice Department could not and would not change the outcome of the election, the Defendant responded, "Just say that the election was corrupt and leave the rest to me and the Republican congressmen."

75. On December 28, Co-Conspirator 4 sent a draft letter to the Acting Attorney General and Acting Deputy Attorney General, which he proposed they all sign. The draft was addressed to state officials in Georgia, and Co-Conspirator 4 proposed sending versions of the letter to elected officials in other targeted states. The proposed letter contained numerous knowingly false claims about the election and the Justice Department, including that:

a. The Justice Department had "identified significant concerns that may have impacted the outcome of the election in multiple States[.]"

b. The Justice Department believed that in Georgia and other states, two valid slates of electors had gathered at the proper location on

December 14, and that both sets of ballots had been transmitted to Congress. That is, Co-Conspirator 4's letter sought to advance the Defendant's fraudulent elector plan by using the authority of the Justice Department to falsely present the fraudulent electors as a valid alternative to the legitimate electors.

c. The Justice Department urged that the state legislature convene a special legislative session to create the opportunity to, among other things, choose the fraudulent electors over the legitimate electors.

76. The Acting Deputy Attorney General promptly responded to Co-Conspirator 4 by email and told him that his proposed letter was false, writing, "Despite dramatic claims to the contrary, we have not seen the type of fraud that calls into question the reported (and certified) results of the election." In a meeting shortly thereafter, the Acting Attorney General and Acting Deputy Attorney General again directed Co-Conspirator 4 not to have unauthorized contact with the White House.

77. On December 31, the Defendant summoned to the Oval Office the Acting Attorney General, Acting Deputy Attorney General, and other advisors. In the meeting, the Defendant again raised claims about election fraud that Justice Department officials already had told him were not true—and that the senior Justice Department officials reiterated were false—and suggested he might change the leadership in the Justice Department.

78. On January 2, 2021, just four days before Congress's certification proceeding, Co- Conspirator 4 tried to coerce the Acting Attorney General and Acting

Deputy Attorney General to sign and send Co-Conspirator 4's draft letter, which contained false statements, to state officials. He told them that the Defendant was considering making Co-Conspirator 4 the new Acting Attorney General, but that Co-Conspirator 4 would decline the Defendant's offer if the Acting Attorney General and Acting Deputy Attorney General would agree to send the proposed letter to the targeted states. The Justice Department officials refused.

79. The next morning, on January 3, despite having uncovered no additional evidence of election fraud, Co-Conspirator 4 sent to a Justice Department colleague an edited version of his draft letter to the states, which included a change from its previous claim that the Justice Department had "concerns" to a stronger false claim that "[a]s of today, there is evidence of significant irregularities that may have impacted the outcome of the election in multiple States …."

80. Also on the morning of January 3, Co-Conspirator 4 met with the Defendant at the White House—again without having informed senior Justice Department officials—and accepted the Defendant's offer that he become Acting Attorney General.

81. On the afternoon of January 3, Co-Conspirator 4 spoke with a Deputy White House Counsel. The previous month, the Deputy White House Counsel had informed the Defendant that "there is no world, there is no option in which you do not leave the White House [o]n January 20th." Now, the same Deputy White House Counsel tried to dissuade Co-Conspirator 4 from assuming the role of Acting Attorney General. The Deputy White House Counsel reiterated to Co-Conspirator 4 that there had not been

outcome-determinative fraud in the election and that if the Defendant remained in office nonetheless, there would be "riots in every major city in the United States." Co-Conspirator 4 responded, "Well, [Deputy White House Counsel], that's why there's an Insurrection Act."

82. Also that afternoon, Co-Conspirator 4 met with the Acting Attorney General and told him that the Defendant had decided to put Co-Conspirator 4 in charge of the Justice Department. The Acting Attorney General responded that he would not accept being fired by a subordinate and immediately scheduled a meeting with the Defendant for that evening.

83. On the evening of January 3, the Defendant met for a briefing on an overseas national security issue with the Chairman of the Joint Chiefs of Staff and other senior national security advisors. The Chairman briefed the Defendant on the issue—which had previously arisen in December—as well as possible ways the Defendant could handle it. When the Chairman and another advisor recommended that the Defendant take no action because Inauguration Day was only seventeen days away and any course of action could trigger something unhelpful, the Defendant calmly agreed, stating, "Yeah, you're right, it's too late for us. We're going to give that to the next guy."

84. The Defendant moved immediately from this national security briefing to the meeting that the Acting Attorney General had requested earlier that day, which included Co-Conspirator 4, the Acting Attorney General, the Acting Deputy Attorney General, the Justice Department's Assistant Attorney General for the Office of Legal Counsel, the White

House Counsel, a Deputy White House Counsel, and a Senior Advisor. At the meeting, the Defendant expressed frustration with the Acting Attorney General for failing to do anything to overturn the election results, and the group discussed Co-Conspirator 4's plans to investigate purported election fraud and to send his proposed letter to state officials—a copy of which was provided to the Defendant during the meeting. The Defendant relented in his plan to replace the Acting Attorney General with Co-Conspirator 4 only when he was told that it would result in mass resignations at the Justice Department and of his own White House Counsel.

85. At the meeting in the Oval Office on the night of January 3, Co-Conspirator 4 suggested that the Justice Department should opine that the Vice President could exceed his lawful authority during the certification proceeding and change the election outcome. When the Assistant Attorney General for the Office of Legal Counsel began to explain why the Justice Department should not do so, the Defendant said, "No one here should be talking to the Vice President. I'm talking to the Vice President," and ended the discussion.

The Defendant's Attempts to Enlist the Vice President to Fraudulently Alter the Election Results at the January 6 Certification Proceeding

86. As the January 6 congressional certification proceeding approached and other efforts to impair, obstruct, and defeat the federal government function failed, the Defendant sought to enlist the Vice President to use his ceremonial role at the certification to fraudulently alter the election results. The Defendant did this first by using knowingly false

claims of election fraud to convince the Vice President to accept the Defendant's fraudulent electors, reject legitimate electoral votes, or send legitimate electoral votes to state legislatures for review rather than count them. When that failed, the Defendant attempted to use a crowd of supporters that he had gathered in Washington, D.C., to pressure the Vice President to fraudulently alter the election results.

87. On December 19, 2020, after cultivating widespread anger and resentment for weeks with his knowingly false claims of election fraud, the Defendant urged his supporters to travel to Washington on the day of the certification proceeding, tweeting, "Big protest in D.C. on January 6th. Be there, will be wild!" Throughout late December, he repeatedly urged his supporters to come to Washington for January 6.

88. On December 23, the Defendant re-tweeted a memo titled "Operation 'PENCE' CARD," which falsely asserted that the Vice President could, among other things, unilaterally disqualify legitimate electors from six targeted states.

89. On the same day, Co-Conspirator 2 circulated a two-page memorandum outlining a plan for the Vice President to unlawfully declare the Defendant the certified winner of the presidential election. In the memorandum, Co-Conspirator 2 claimed that seven states had transmitted two slates of electors and proposed that the Vice President announce that "because of the ongoing disputes in the 7 States, there are no electors that can be deemed validly appointed in those States." Next, Co-Conspirator 2 proposed steps that he acknowledged violated the ECA, advocating that, in the end, "Pence then gavels President Trump as re-elected." Just two months

earlier, on October 11, Co-Conspirator 2 had taken the opposite position, writing that neither the Constitution nor the ECA provided the Vice President discretion in the counting of electoral votes, or permitted him to "make the determination on his own."

90. On several private phone calls in late December and early January, the Defendant repeated knowingly false claims of election fraud and directly pressured the Vice President to use his ceremonial role at the certification proceeding on January 6 to fraudulently overturn the results of the election, and the Vice President resisted, including:

a. On December 25, when the Vice President called the Defendant to wish him a Merry Christmas, the Defendant quickly turned the conversation to January 6 and his request that the Vice President reject electoral votes that day. The Vice President pushed back, telling the Defendant, as the Vice President already had in previous conversations, "You know I don't think I have the authority to change the outcome."

b. On December 29, as reflected in the Vice President's contemporaneous notes, the Defendant falsely told the Vice President that the "Justice Dept [was] finding major infractions."

c. On January 1, the Defendant called the Vice President and berated him because he had learned that the Vice President had opposed a lawsuit seeking a judicial decision that, at the certification, the Vice President had the authority to reject or return votes to the states

under the Constitution. The Vice President responded that he thought there was no constitutional basis for such authority and that it was improper. In response, the Defendant told the Vice President, "You're too honest." Within hours of the conversation, the Defendant reminded his supporters to meet in Washington before the certification proceeding, tweeting, "The BIG Protest Rally in Washington, D.C, will take place at 11.00 A.M. on January 6th. Locational details to follow. StopTheSteal!"

d. On January 3, the Defendant again told the Vice President that at the certification proceeding, the Vice President had the absolute right to reject electoral votes and the ability to overturn the election. The Vice President responded that he had no such authority, and that a federal appeals court had rejected the lawsuit making that claim the previous day.

91. On January 3, Co-Conspirator 2 circulated a second memorandum that included a new plan under which, contrary to the ECA, the Vice President would send the elector slates to the state legislatures to determine which slate to count.

92. On January 4, the Defendant held a meeting with Co-Conspirator 2, the Vice President, the Vice President's Chief of Staff, and the Vice President's Counsel for the purpose of convincing the Vice President, based on the Defendant's knowingly false claims of election fraud, that the Vice President should reject or send to the states Biden's legitimate electoral votes, rather than count them. The Defendant deliberately excluded his White House Counsel from the meeting because the White House

Counsel previously had pushed back on the Defendant's false claims of election fraud.

93. During the meeting, as reflected in the Vice President's contemporaneous notes, the Defendant made knowingly false claims of election fraud, including, "Bottom line—won every state by 100,000s of votes" and "We won every state," and asked—regarding a claim his senior Justice Department officials previously had told him was false, including as recently as the night before—"What about 205,000 votes more in PA than voters?" The Defendant and Co-Conspirator 2 then asked the Vice President to either unilaterally reject the legitimate electors from the seven targeted states, or send the question of which slate was legitimate to the targeted states' legislatures. When the Vice President challenged Co-Conspirator 2 on whether the proposal to return the question to the states was defensible, Co-Conspirator 2 responded, "Well, nobody's tested it before." The Vice President then told the Defendant, "Did you hear that? Even your own counsel is not saying I have that authority." The Defendant responded, "That's okay, I prefer the other suggestion" of the Vice President rejecting the electors unilaterally.

94. Also on January 4, when Co-Conspirator 2 acknowledged to the Defendant's Senior Advisor that no court would support his proposal, the Senior Advisor told Co-Conspirator 2, "[Y]ou're going to cause riots in the streets." Co-Conspirator 2 responded that there had previously been points in the nation's history where violence was necessary to protect the republic. After that conversation, the Senior Advisor notified the Defendant that Co-Conspirator 2 had conceded that his plan was "not going to work."

95. On the morning of January 5, at the Defendant's direction, the Vice President's Chief of Staff and the Vice President's Counsel met again with Co-Conspirator 2. Co- Conspirator 2 now advocated that the Vice President do what the Defendant had said he preferred the day before: unilaterally reject electors from the targeted states. During this meeting, Co- Conspirator 2 privately acknowledged to the Vice President's Counsel that he hoped to prevent judicial review of his proposal because he understood that it would be unanimously rejected by the Supreme Court. The Vice President's Counsel expressed to Co-Conspirator 2 that following through with the proposal would result in a "disastrous situation" where the election might "have to be decided in the streets."

96. That same day, the Defendant encouraged supporters to travel to Washington on January 6, and he set the false expectation that the Vice President had the authority to and might use his ceremonial role at the certification proceeding to reverse the election outcome in the Defendant's favor, including issuing the following Tweets:

a. At 11:06 a.m., "The Vice President has the power to reject fraudulently chosen electors." This was within 40 minutes of the Defendant's earlier reminder, "See you in D.C."

b. At 5:05 p.m., "Washington is being inundated with people who don't want to see an election victory stolen . . . . Our Country has had enough, they won't take it anymore! We hear you (and love you) from the Oval Office."

c. At 5:43 p.m., "I will be speaking at the SAVE AMERICA RALLY tomorrow on the Ellipse at

> 11AM Eastern. Arrive early — doors open at 7AM Eastern. BIG CROWDS!"

97. Also on January 5, the Defendant met alone with the Vice President. When the Vice President refused to agree to the Defendant's request that he obstruct the certification, the Defendant grew frustrated and told the Vice President that the Defendant would have to publicly criticize him. Upon learning of this, the Vice President's Chief of Staff was concerned for the Vice President's safety and alerted the head of the Vice President's Secret Service detail.

98. As crowds began to gather in Washington and were audible from the Oval Office, the Defendant remarked to advisors that the crowd the following day on January 6 was going to be "angry."

99. That night, the Defendant approved and caused the Defendant's Campaign to issue a public statement that the Defendant knew, from his meeting with the Vice President only hours earlier, was false: "The Vice President and I are in total agreement that the Vice President has the power to act."

100. On January 6, starting in the early morning hours, the Defendant again turned to knowingly false statements aimed at pressuring the Vice President to fraudulently alter the election outcome, and raised publicly the false expectation that the Vice President might do so:

> a. At 1:00 a.m., the Defendant issued a Tweet that falsely claimed, "If Vice President @Mike_Pence comes through for us, we will win the Presidency. Many States want to decertify the mistake they made in certifying incorrect & even fraudulent numbers in a process NOT

approved by their State Legislatures (which it must be). Mike can send it back!"

b. At 8:17 a.m., the Defendant issued a Tweet that falsely stated, "States want to correct their votes, which they now know were based on irregularities and fraud, plus corrupt process never received legislative approval. All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!"

101. On the morning of January 6, an agent of the Defendant contacted a United States Senator to ask him to hand-deliver documents to the Vice President. The agent then facilitated the receipt by the Senator's staff of the fraudulent certificates signed by the Defendant's fraudulent electors in Michigan and Wisconsin, which were believed not to have been delivered to the Vice President or Archivist by mail. When one of the Senator's staffers contacted a staffer for the Vice President by text message to arrange for delivery of what the Senator's staffer had been told were "[alternate slate[s] of electors for MI and WI because archivist didn't receive them," the Vice President's staffer rejected them.

102. At 11:15 a.m., the Defendant called the Vice President and again pressured him to fraudulently reject or return Biden's legitimate electoral votes. The Vice President again refused. Immediately after the call, the Defendant decided to single out the Vice President in public remarks he would make within the hour, reinserting language that he had personally drafted earlier that morning—falsely claiming that the Vice President had authority to send electoral votes to the states—but that advisors had previously successfully advocated be removed.

103. Earlier that morning, the Defendant had selected Co-Conspirator 2 to join Co- Conspirator 1 in giving public remarks before his own. When they did so, based on knowingly false election fraud claims, Co-Conspirator 1 and Co-Conspirator 2 intensified pressure on the Vice President to fraudulently obstruct the certification proceeding:

> a. Co-Conspirator 1 told the crowd that the Vice President could "cast [the ECA] aside" and unilaterally "decide on the validity of these crooked ballots[.]" He also lied when he claimed to "have letters from five legislatures begging us" to send elector slates to the legislatures for review, and called for "trial by combat."
>
> b. Co-Conspirator 2 told the crowd, "[A]ll we are demanding of Vice President Pence is this afternoon at one o'clock he let the legislatures of the state look into this so we get to the bottom of it and the American people know whether we have control of the direction of our government or not. We no longer live in a self-governing republic if we can't get the answer to this question."

104. Next, beginning at 11:56 a.m., the Defendant made multiple knowingly false statements integral to his criminal plans to defeat the federal government function, obstruct the certification, and interfere with others' right to vote and have their votes counted. The Defendant repeated false claims of election fraud, gave false hope that the Vice President might change the election outcome, and directed the crowd in front of him to go to the Capitol as a means to obstruct the certification and pressure the Vice President to fraudulently obstruct the certification. The

Defendant's knowingly false statements for these purposes included:

a. The Defendant falsely claimed that, based on fraud, the Vice President could alter the outcome of the election results, stating:

> I hope Mike is going to do the right thing. I hope so, I hope so.
>
> Because if Mike Pence does the right thing, we win the election. All he has to do—all, this is, this is from the number one, or certainly one of the top, Constitutional lawyers in our country—he has the absolute right to do it. We're supposed to protect our country, support our country, support our Constitution, and protect our Constitution.
>
> States want to revote. The states got defrauded. They were given false information. They voted on it. Now they want to recertify. They want it back. All Vice President Pence has to do is send it back to the states to recertify and we become president and you are the happiest people.

b. After the Defendant falsely stated that the Pennsylvania legislature wanted "to recertify their votes. They want to recertify. But the only way that can happen is if Mike Pence agrees to send it back," the crowd began to chant, "Send it back."

c. The Defendant also said that regular rules no longer applied, stating, "And fraud breaks up everything, doesn't it? When you catch

somebody in a fraud, you're allowed to go by very different rules."

d. Finally, after exhorting that "we fight. We fight like hell. And if you don't fight like hell, you're not going to have a country anymore," the Defendant directed the people in front of him to head to the Capitol, suggested he was going with them, and told them to give Members of Congress "the kind of pride and boldness that they need to take back our country."

105. During and after the Defendant's remarks, thousands of people marched toward the Capitol.

The Defendant's Exploitation of The Violence and Chaos at the Capitol

106. Shortly before 1:00 p.m., the Vice President issued a public statement explaining that his role as President of the Senate at the certification proceeding that was about to begin did not include "unilateral authority to determine which electoral votes should be counted and which should not."

107. Before the Defendant had finished speaking, a crowd began to gather at the Capitol. Thereafter, a mass of people—including individuals who had traveled to Washington and to the Capitol at the Defendant's direction—broke through barriers cordoning off the Capitol grounds and advanced on the building, including by violently attacking law enforcement officers trying to secure it.

108. The Defendant, who had returned to the White House after concluding his remarks, watched events at the Capitol unfold on the television in the dining room next to the Oval Office.

109. At 2:13 p.m., after more than an hour of steady, violent advancement, the crowd at the Capitol broke into the building.

110. Upon receiving news that individuals had breached the Capitol, the Defendant's advisors told him that there was a riot there and that rioters had breached the building. When advisors urged the Defendant to issue a calming message aimed at the rioters, the Defendant refused, instead repeatedly remarking that the people at the Capitol were angry because the election had been stolen.

111. At 2:24 p.m., after advisors had left the Defendant alone in his dining room, the Defendant issued a Tweet intended to further delay and obstruct the certification: "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!"

112. One minute later, at 2:25 p.m., the United States Secret Service was forced to evacuate the Vice President to a secure location.

113. At the Capitol, throughout the afternoon, members of the crowd chanted, "Hang Mike Pence!"; "Where is Pence? Bring him out!"; and "Traitor Pence!"

114. The Defendant repeatedly refused to approve a message directing rioters to leave the Capitol, as urged by his most senior advisors—including the White House Counsel, a Deputy White House Counsel, the Chief of Staff, a Deputy Chief of Staff, and a Senior Advisor. Instead, the Defendant issued two Tweets that did not ask rioters to leave the

Capitol but instead falsely suggested that the crowd at the Capitol was being peaceful, including:

a. At 2:38 p.m., "Please support our Capitol Police and Law Enforcement. They are truly on the side of our Country. Stay peaceful!"

b. At 3:13 p.m., "I am asking for everyone at the U.S. Capitol to remain peaceful. No violence! Remember, WE are the Party of Law & Order -- respect the Law and our great men and women in Blue. Thank you!"

115. At 3:00 p.m., the Defendant had a phone call with the Minority Leader of the United States House of Representatives. The Defendant told the Minority Leader that the crowd at the Capitol was more upset about the election than the Minority Leader was.

116. At 4:17 p.m., the Defendant released a video message on Twitter that he had just taped in the White House Rose Garden. In it, the Defendant repeated the knowingly false claim that "[w]e had an election that was stolen from us," and finally asked individuals to leave the Capitol, while telling them that they were "very special" and that "we love you."

117. After the 4:17 p.m. Tweet, as the Defendant joined others in the outer Oval Office to watch the attack on the Capitol on television, the Defendant said, "See, this is what happens when they try to steal an election. These people are angry. These people are really angry about it. This is what happens."

118. At 6:01 p.m., the Defendant tweeted, "These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!"

119. On the evening of January 6, the Defendant and Co-Conspirator 1 attempted to exploit the violence and chaos at the Capitol by calling lawmakers to convince them, based on knowingly false claims of election fraud, to delay the certification, including:

a. The Defendant, through White House aides, attempted to reach two United States Senators at 6:00 p.m.

b. From 6:59 p.m. until 7:18 p.m., Co-Conspirator 1 placed calls to five United States Senators and one United States Representative.

c. Co-Conspirator 6 attempted to confirm phone numbers for six United States Senators whom the Defendant had directed Co-Conspirator 1 to call and attempt to enlist in further delaying the certification.

d. In one of the calls, Co-Conspirator 1 left a voicemail intended for a United States Senator that said, "We need you, our Republican friends, to try to just slow it down so we can get these legislatures to get more information to you. And I know they're reconvening at eight tonight but the only strategy we can follow is to object to numerous states and raise issues so that we get ourselves into tomorrow—ideally until the end of tomorrow."

e. In another message intended for another United States Senator, Co-Conspirator 1 repeated knowingly false allegations of election fraud, including that the vote counts certified by the states to Congress were incorrect and that the governors who had certified knew they

> were incorrect; that "illegal immigrants" had voted in substantial numbers in Arizona; and that "Georgia gave you a number in which 65,000 people who were underage voted." Co-Conspirator 1 also claimed that the Vice President's actions had been surprising and asked the Senator to "object to every state and kind of spread this out a little bit like a filibuster[.]"

120. At 7:01 p.m., while Co-Conspirator 1 was calling United States Senators on behalf of the Defendant, the White House Counsel called the Defendant to ask him to withdraw any objections and allow the certification. The Defendant refused.

121. The attack on the Capitol obstructed and delayed the certification for approximately six hours, until the Senate and House of Representatives came back into session separately at 8:06 p.m. and 9:02 p.m., respectively, and came together in a Joint Session at 11:35 p.m.

122. At 11:44 p.m., Co-Conspirator 2 emailed the Vice President's Counsel advocating that the Vice President violate the law and seek further delay of the certification. Co-Conspirator 2 wrote, "I implore you to consider one more relatively minor violation [of the ECA] and adjourn for 10 days to allow the legislatures to finish their investigations, as well as to allow a full forensic audit of the massive amount of illegal activity that has occurred here."

123. At 3:41 a.m. on January 7, as President of the Senate, the Vice President announced the certified results of the 2020 presidential election in favor of Biden.

124. The Defendant and his co-conspirators committed one or more of the acts to effect the object of the conspiracy alleged above in Paragraphs 13, 15-16, 18-22, 24, 26, 28, 30-33, 35, 37-39, 41, 43-44, 46, 50, 52, 54, 56, 57-64, 67, 71-75, 78-82, 84, 85, 87-97, 99-100, 102-104, 111, 114, 116, 118-119, and 122.

(In violation of Title 18, United States Code, Section 371)

COUNT TWO
(Conspiracy to Obstruct an Official Proceeding—18 U.S.C. § 1512(k))

125. The allegations contained in paragraphs 1 through 4 and 8 through 123 of this Indictment are re-alleged and fully incorporated here by reference.

126. From on or about November 14, 2020, through on or about January 7, 2021, in the District of Columbia and elsewhere, the Defendant,

DONALD J. TRUMP,

did knowingly combine, conspire, confederate, and agree with co-conspirators, known and unknown to the Grand Jury, to corruptly obstruct and impede an official proceeding, that is, the certification of the electoral vote, in violation of Title 18, United States Code, Section 1512(c)(2).

(In violation of Title 18, United States Code, Section 1512(k))

COUNT THREE
(Obstruction of, and Attempt to Obstruct, an Official Proceeding—18 U.S.C. §§ 1512(c)(2), 2)

127. The allegations contained in paragraphs 1 through 4 and 8 through 123 of this Indictment are re-alleged and fully incorporated here by reference.

128. From on or about November 14, 2020, through on or about January 7, 2021, in the District of Columbia and elsewhere, the Defendant,

DONALD J. TRUMP,

attempted to, and did, corruptly obstruct and impede an official proceeding, that is, the certification of the electoral vote.

(In violation of Title 18, United States Code, Sections 1512(c)(2), 2)

COUNT FOUR

(Conspiracy Against Rights—18 U.S.C. § 241)

129. The allegations contained in paragraphs 1 through 4 and 8 through 123 of this Indictment are re-alleged and fully incorporated here by reference.

130. From on or about November 14, 2020, through on or about January 20, 2021, in the District of Columbia and elsewhere, the Defendant,

DONALD J. TRUMP,

did knowingly combine, conspire, confederate, and agree with co-conspirators, known and unknown to the Grand Jury, to injure, oppress, threaten, and intimidate one or more persons in the free exercise and enjoyment of a right and privilege secured to them by the Constitution and laws of the United States—that is, the right to vote, and to have one's vote counted.

(In violation of Title 18, United States Code, Section 241)

/s/ Jack Smith
JACK SMITH
SPECIAL COUNSEL
UNITED STATES DEPARTMENT OF JUSTICE

A TRUE BILL

_____
FOREPERSON

(ORDER LIST: 601 U.S.)

WEDNESDAY, FEBRUARY 28, 2024

CERTIORARI GRANTED

23-939 TRUMP, DONALD J. V. UNITED STATES
(23A745)

The application for a stay presented to The Chief Justice is referred by him to the Court. The Special Counsel's request to treat the stay application as a petition for a writ of certiorari is granted, and that petition is granted limited to the following question: Whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office. Without expressing a view on the merits, this Court directs the Court of Appeals to continue withholding issuance of the mandate until the sending down of the judgment of this Court. The application for a stay is dismissed as moot.

The case will be set for oral argument during the week of April 22, 2024. Petitioner's brief on the merits, and any *amicus curiae* briefs in support or in support of neither party, are to be filed on or before Tuesday, March 19, 2024. Respondent's brief on the merits, and any *amicus curiae* briefs in support, are to be filed on or before Monday, April 8, 2024. The reply brief, if any, is to be filed on or before 5 p.m., Monday, April 15, 2024.

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