No. 23-624

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

DONALD J. TRUMP,
Respondent.

On Petition for a Writ of Certiorari Before Judgment to the U.S. Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTIONS PRESENTED

Petitioner's proposed Question Presented misstates the legal issue in this appeal by incorrectly framing it as whether absolute presidential immunity extends to "crimes committed while in office." Pet. i. In the district court, Respondent ("President Trump") asserted that a President is immune from prosecution for *official acts*. The questions presented thus are:

I. Whether the doctrine of absolute presidential immunity includes immunity from criminal prosecution for a President's official acts, *i.e.*, those performed within the "'outer perimeter' of his official responsibility." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 755 (1982) (quoting *Barr* v. *Matteo*, 360 U.S. 564, 575 (1959)).

II. Whether the Impeachment Judgment Clause, U.S. CONST. art. I, § 3, cl. 7, and principles of double jeopardy foreclose the criminal prosecution of a President who has been impeached and acquitted by the U.S. Senate for the same and/or closely related conduct that underlies the criminal charges.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

- *United States* v. *Trump*, No. 23-cr-257 (Dec. 1, 2023)

United States Court of Appeals (D.C. Cir.):

- *United States* v. *Trump*, No. 23-3190 (opinion issued Dec. 8, 2023)
- *United States* v. *Trump*, No. 23-3228 (docketed Dec. 8, 2023)

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INTRODUCTION

"This case presents a fundamental question at the heart of our democracy," Pet. 2—whether a President may be criminally prosecuted for his official acts. The "paramount public importance" of that question, Pet. 15, calls for it to be resolved in a cautious, deliberative manner—not at breakneck speed.

In 234 years of American history, no President ever faced criminal prosecution for his official acts. Until 19 days ago, no court had ever addressed whether immunity from such prosecution exists. To this day, no appellate court has addressed it. The question stands among the most complex, intricate, and momentous issues that this Court will be called on to decide.

This Court's ordinary review procedures will allow the D.C. Circuit to address this appeal in the first instance, thus granting this Court the benefit of an appellate court's prior consideration of these historic topics and performing the traditional winnowing function that this Court has long preferred. Indeed, the D.C. Circuit has already granted highly expedited review of President Trump's appeal over President Trump's opposition, with briefing to be concluded by January 2, 2024, and oral argument scheduled for January 9, 2024.

The Special Counsel urges this Court to bypass those ordinary procedures, including the longstanding preference for prior consideration by at least one court of appeals, and rush to decide the issues with reckless abandon. The Court should decline that invitation at this time, for several reasons.

First, the government lacks Article III and prudential standing to appeal from a district-court

judgment that decided all issues in its favor and thus does not injure it. *Camreta* v. *Greene*, 563 U.S. 692, 701-02 (2011). Because the government is not injured by the decision below, this case does not fall within the narrow class of cases where this Court has permitted a prevailing party to appeal from a lower-court victory.

Second, prudential considerations weigh heavily in favor of allowing the D.C. Circuit to address the issues in this case before this Court, consistent with the Court's ordinary review procedures. In fact, such lower-court consideration is rapidly underway—the D.C. Circuit has expedited President Trump's appeal and scheduled briefing to conclude by January 2, 2024, with oral argument on January 9, 2024.

Third, the Special Counsel identifies no compelling reason for the extraordinary haste he proposes. Instead, he vaguely asserts that the "public interest" favors resolution on a dramatically accelerated timetable, to ensure that President Trump may be brought to trial in the next few months. In doing so, he confuses the "public interest" with the manifest *partisan* interest in ensuring that President Trump will be subjected to a months-long criminal trial at the height of a presidential campaign where he is the leading candidate and the only serious opponent of the current Administration. The combination of an almost three-year wait to bring this case and the Special Counsel's current demand for extraordinary expedition, supported by the vaguest of justifications, creates a compelling inference of partisan motivation.

Fourth, the case law the Special Counsel cites does not support his request. Most notably, in *United States* v. *Nixon*, 418 U.S. 683 (1974), this Court did not face the same historically blank slate that it

confronts here. In *Nixon*, there had been extensive, thoughtful consideration of presidential privilege applied to criminal subpoenas, including multiple appellate decisions, over nearly two centuries between *United States* v. *Burr*, 25 F. Cas. 187 (C.C. Va. 1807) (No. 14,694), and *Nixon* v. *Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (en banc). Here, the sum total of judicial grappling with this issue is one 19-day-old district court opinion. This history counsels in favor of allowing the D.C. Circuit to address this appeal first, in the ordinary course.

Fifth, the district court's ruling below was issued nine days after the close of briefing, due to the Special Counsel's insistence on speedy resolution. The result was a hasty analysis of complex issues that overlooks binding authority and commits manifold errors—thus illustrating the hazards of rushed consideration of these questions.

This appeal presents momentous, historic questions. An erroneous denial of a claim of presidential immunity from criminal prosecution unquestionably warrants this Court's review. The Special Counsel contends that "[i]t is of imperative public importance that respondent's claims of immunity be resolved by this Court." Pet. 2. That does not entail, however, that the Court should take the case before the lower courts complete their review. Every jurisdictional and prudential consideration calls for this Court to allow the appeal to proceed first in the D.C. Circuit. "'Haste makes waste' is an old adage. It has survived because it is right so often." *Kusay* v. *United States*, 62 F.3d 192, 195 (7th Cir. 1995).

JURISDICTIONAL STATEMENT

The Court lacks jurisdiction to grant the petition because the government lacks Article III and prudential standing to appeal from a judgment that is entirely favorable to it. The government seeks direct appellate review of a district-court decision that granted it all the relief it sought and did not rule *against* it on any issue.

When "this Court grant[s] certiorari before judgment," it "effectively stand[s] in the shoes of the Court of Appeals." *Whole Woman's Health* v. *Jackson*, 595 U.S. 30, 38 (2021). A party seeking certiorari before judgment to review a district-court decision, therefore, must have standing to appeal the decision to the Court of Appeals. Here, the government, which prevailed on every disputed issue below, could not have filed its own appeal to the D.C. Circuit. The government suffers no injury from the district court's decision and lacks standing to appeal from it. *Hollingsworth* v. *Perry*, 570 U.S. 693, 705 (2013) ("[S]tanding 'must be met by persons seeking appellate review.'") (quoting *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997)).

In rare instances, this Court may grant a petition for review from a prevailing party, but that victor must suffer an ongoing traceable, redressable injury from the otherwise-favorable decision of the lower court. *Camreta*, 563 U.S. at 701-02; *see also Deposit Guar. Nat'l Bank, Jackson, Miss.* v. *Roper*, 445 U.S. 326, 334 (1980) (holding that a prevailing party may appeal only if "that party retains a stake in the appeal satisfying the requirements of Art. III"); *Pub. Serv. Comm'n of Mo.* v. *Brashear Freight Lines*, 306 U.S. 204, 206 (1939) ("[T]he successful party below has no standing to appeal from the decree denying the

injunction."). This Court's cases "demand" that a prevailing party who appeals must suffer ongoing "injury, causation, and redressability" from the challenged decision. *Camreta*, 563 U.S. at 703.

In cases where a prevailing party's standing to appeal a favorable decision has been recognized, the ruling challenged on appeal decided a significant issue *against* that party in a way that inflicted ongoing injury to the party. Thus, an official whose conduct is deemed unconstitutional but is granted qualified immunity, though prevailing on the merits, suffers an ongoing injury from the decision—a *de facto* restriction on his or her freedom to engage in such conduct in the future. *Id.* Likewise, class-action plaintiffs who have a nominal judgment in their favor entered against their will still have standing to appeal from an order denying class certification, as such denial deprives them of a significant procedural right. *Roper*, 445 U.S. at 336. Similarly, an alleged infringer who challenges a patent's validity may appeal from an order upholding the patent's validity but holding that his conduct had not infringed it. *Elec. Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241, 242 (1939). Each such decision mixes an unfavorable ruling on an important issue—one with ongoing practical consequences to the appealing party—with a favorable ruling on another ground that resulted in a favorable judgment below.

Not so here. The district court denied President Trump's claims of presidential immunity and double jeopardy *in toto*, wrongfully holding that there is no presidential immunity from criminal prosecution for official acts at all, and that there is no bar to criminal prosecution from President Trump's Senate acquittal. Pet.App.7a-38a, 46a-53a. The district court did not

rule against the government on any disputed issue. *Id.* "The judgment," therefore, does not "have prospective effect" of an adverse nature on the government. *Camreta*, 563 U.S. at 702. No injury to the government is "fairly traceable to the" district court's decision. *California* v. *Texas*, 141 S. Ct. 2104, 2113 (2021) (quotations omitted).

The only injury the Special Counsel asserts in this appeal—*i.e.*, possible delay of the trial date—even if it is cognizable at all, is not "caused" by the district court's decision in the prosecution's favor on all issues. *Camreta*, 563 U.S. at 703. Instead, the government contends that this Court's rulings in *Griggs* and *Coinbase*, which require a stay of proceedings pending appeal, are inconvenient and therefore harmful. *See Coinbase, Inc.* v. *Bielski*, 599 U.S. 736, 742 (2023); *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). The government may be injured by President Trump's appeal, but it is not injured by the district court's judgment, and thus it may not file its own appeal from that judgment.

Moreover, even if the Court had jurisdiction to grant the petition under Article III, which it does not, the Court should not exercise it here, under longstanding rules of prudential standing. "Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Roper*, 445 U.S. at 333; *see also Camreta*, 563 U.S. at 703-04 ("As a matter of practice and prudence, we have generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed us to do so."). This Court's

"practice reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed." *Camreta*, 563 U.S. at 704 (quoting *Bunting* v. *Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from denial of certiorari)). The Special Counsel's bare, political desire to have an earlier potential trial date does not place this case "in a special category when it comes to this Court's review of appeals brought by winners." *Id.* And, as discussed in further detail below, every other prudential consideration weighs *against* the over-hasty review sought by the Special Counsel.

The Special Counsel ignores this issue in his jurisdictional statement—an omission that illustrates the hazards of expedited briefing. His jurisdictional statement merely cites *Biden* v. *Nebraska*, 143 S. Ct. 477 (2022), and *United States* v. *Nixon*, 417 U.S. 927 (1974), with a parenthetical note that, in each, certiorari before judgment was granted to the "party that prevailed in the district court." Pet. 2. Neither case, however, addressed the prevailing party's Article III or prudential standing to appeal from a victorious ruling in the trial court. "[D]rive-by jurisdictional rulings of this sort . . . have no precedential effect." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). Indeed, *Camreta* and *Roper* post-date *Nixon*, but neither case discussed *Nixon* in analyzing appellate standing.

Moreover, in *Nebraska*, the State respondents did not oppose the government's request for certiorari before judgment, which was embedded in an application to vacate the Eighth Circuit's nationwide injunction pending appeal, and so the issue was never raised or discussed by the parties or the Court. The State respondents agreed that "if the Court thinks the

application raises close questions, it should … grant certiorari before judgment ….” Resp. to Appl. Vacate Inj. at 39–40, *Biden* v. *Nebraska*, 143 S. Ct. 2355 (2023) (No. 22-506). In short, the Special Counsel cites no case supporting the government’s appellate standing here.

STATEMENT

I. The Indictment Alleges Purely Official Acts.

On August 1, 2023, President Trump was indicted on four counts related to his attempts to dispute the outcome of the 2020 presidential election. D.Ct. Doc. 1. The indictment does not charge President Trump with responsibility for the events at the Capitol on January 6, 2021. *See id.* Instead, it charges President Trump with acts of political speech and advocacy in disputing the election’s outcome performed while President Trump was still in office. *Id.* The indictment alleges that President Trump engaged in five types of conduct:

First, it alleges that President Trump made a series of tweets and other public statements on matters of paramount federal concern, disputing the outcome of the 2020 federal election and contending that the election was tainted by fraud and irregularities. *See id.* ¶¶ 2, 11-12, 19, 32-34, 37, 41-42, 46, 52, 99, 102, 104 (alleging public statements regarding the federal election and state and federal officials’ exercise of their official responsibilities with respect to the election); *id.* ¶¶ 22, 28, 44, 50, 87-88, 90(c), 96(a)-(c), 100(a)-(b), 111, 114 (alleging tweets about the same topics).

Second, the indictment alleges that President Trump communicated with the Acting Attorney General and officials at the U.S. Department of

Justice—which he oversaw as part of his official duties as President, our country's chief executive—about investigating election crimes and possibly appointing a new Acting Attorney General. D.Ct. Doc. 1, ¶ 10(c); *id.* ¶¶ 27, 29, 36, 45, 51, 70-85. These include allegations of a series of communications urging the Acting Attorney General and Acting Deputy Attorney General to investigate widespread reports of election fraud, *id.* ¶¶ 29, 36, 45, 51; and allegations of deliberations during Oval Office meetings about whether to replace the Acting Attorney General, a Cabinet-level officer constitutionally appointed by the President, *id.* ¶¶ 74, 77, 84.

Third, the indictment alleges that President Trump communicated with state officials about the administration of the federal election and urged them to exercise their official responsibilities in accordance with extensive information that the 2020 presidential election was widely tainted by fraud and irregularities. *Id.* ¶¶ 10(a), 15-18, 21, 24, 26, 31, 35, 38-39, 43.

Fourth, the indictment alleges that President Trump communicated with the Vice President, in his capacity as President of the Senate, the Vice President's official staff, and other members of Congress to urge them to exercise their official duties with respect to the election certification in accordance with President Trump's contention that the election was tainted by fraud and irregularities. *Id.* ¶¶ 10(d), 86-95, 90(a)-(d), 92-93, 95, 97, 101, 122 (Vice President and his official staff); *id.* ¶¶ 115, 119(b)-(c) (attempts to communicate with other Members of Congress).

Fifth, the indictment alleges that other individuals organized slates of alternate electors from seven

States to provide a justification for the Vice President to exercise his official duties in the manner urged by President Trump. *Id.* ¶¶ 53-69. According to the indictment, these alternate slates of electors were designed to allow the President, in his communications with the Vice President, to justify the exercise of the Vice President's authority to certify the election in Defendant's favor. *Id.* ¶¶ 10(b), 53.

II. President Trump's Motions to Dismiss on Immunity and Double-Jeopardy Grounds.

On October 5, 2023, President Trump moved to dismiss the indictment on grounds of presidential immunity. D.Ct. Doc. 74. President Trump contended that (1) the doctrine of absolute presidential immunity from civil liability for official acts extends to criminal prosecution as well, *id.* at 8-21; and (2) all the conduct alleged in the indictment falls within the scope of immunity because it lies within the "outer perimeter" of presidential duties, *id.* at 21-45.

On the first question, President Trump offered a series of reasons to recognize presidential immunity from criminal prosecution for official acts. *Id.* at 8-21.

First, as emphasized in *Fitzgerald*, the doctrine of presidential immunity is "rooted in the separation of powers under the Constitution." 457 U.S. at 753. "The President occupies a unique position in the constitutional scheme," and the President's "absolute immunity … predicated on his official acts" constitutes "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* at 749. "[T]he President [is] the chief constitutional officer of the Executive Branch,

entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Id.* at 750.

Under the doctrine of separated powers, neither a federal nor a state prosecutor may sit in judgment over a President's official acts, which are vested in the Presidency alone. U.S. CONST. art. II, § 1. Likewise, no state or federal court has jurisdiction to sit in criminal judgment over them. *Id.* As Chief Justice Marshall emphasized in *Marbury* v. *Madison*, "[b]y the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." 5 U.S. (1 Cranch) 137, 165–66 (1803). "The acts of such an officer, as an officer, can never be examinable by the courts." *Id.*

Second, President Trump argued that the Impeachment Judgment Clause presupposes that a President is immune from prosecution for official acts unless he is first impeached and convicted by the Senate. D.Ct. Doc. 74, at 11-13. The Clause provides that "Judgment in Cases of Impeachment shall not extend further than to removal from Office … but *the Party convicted* shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. CONST. art. I, § 3, cl. 7 (emphasis added). The Clause's reference to the "Party convicted" implies that the "Party acquitted" is *not* subject to prosecution for the same conduct. SCALIA & GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012). Thus, the Clause's "plain implication is that criminal prosecution, like removal from the Presidency and disqualification from other offices, is a consequence

that can come about only after the Senate's judgment, not during or prior to the Senate trial." *Trump* v. *Vance*, 140 S. Ct. 2412, 2444 (2020) (Alito, J., dissenting).

Third, President Trump cited evidence from the Founding Era reinforcing his interpretation. D.Ct. Doc. 74, at 11-14. For example, Alexander Hamilton wrote that the criminal prosecution of a President for official acts may occur only *after* impeachment and conviction by the Senate: "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 (Hamilton) (emphasis added); *see also* THE FEDERALIST NO. 77 (Hamilton) (stating that the President is subject to "*subsequent* prosecution" after "impeachment, trial, [and] dismission from office") (emphasis added); *see also Vance*, 140 S. Ct. at 2444 (Alito, J., dissenting) ("This was how Hamilton explained the impeachment provisions in the Federalist Papers.").

Likewise, in *Marbury*, Chief Justice Marshall wrote: "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." 5 U.S. (1 Cranch) at 165–66. When the President "act[s] in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that [his] acts are only politically examinable." *Id.* at 166.

Fourth, in *Fitzgerald*, this Court emphasized that its "immunity decisions have been informed by the common law." 457 U.S. at 747. At common law, official immunity meant, first and foremost, immunity from criminal prosecution—immunity from civil liability was of secondary concern. For example, at common law, "the privilege" of legislative immunity "was not born primarily of a desire to avoid private suits …, but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *United States* v. *Johnson*, 383 U.S. 169, 180–81 (1966). Preventing "the instigation of criminal charges against critical or disfavored legislators" was the "chief fear" that led to the recognition of that doctrine of immunity. *Id.* at 182 (quoted in *Scheuer* v. *Rhodes*, 416 U.S. 232, 241 (1974)).

Fifth, President Trump argued that the 234-year tradition of *not* prosecuting Presidents for official acts supports his claim of immunity. D.Ct. Doc. 74, at 15-16. American history abounds with examples of Presidents who were accused by political opponents of committing crimes through their official acts. These extend, at least, from John Quincy Adams' alleged "corrupt bargain" in appointing Henry Clay as Secretary of State,[1] to President George W. Bush's allegedly false claim to Congress that Saddam Hussein possessed stockpiles of "weapons of mass

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[1] *See, e.g.*, Jessie Kratz, *The 1824 Presidential Election and the "Corrupt Bargain"*, National Archives (Oct. 22, 2020), at https://prologue.blogs.archives.gov/2020/10/22/the-1824-presidential-election-and-the-corrupt-bargain/.

destruction,"[2] to President Obama's alleged authorization of a drone strike that targeted and killed a U.S. citizen (and his teenage son, also a U.S. citizen) located abroad, among many other examples.[3] In each such case, the President's political opponents vehemently accused that President of criminal behavior in his official acts. Yet no President was ever prosecuted, until this year. The unbroken tradition of *not* exercising the formidable power of criminally prosecuting a President for official acts—despite ample motive and opportunity to do so, over centuries—implies that the power does not exist. *See, e.g., NFIB* v. *OSHA*, 595 U.S. 109, 119 (2022) (per curiam) ("This lack of historical precedent … is a telling indication that the mandate extends beyond the agency's legitimate reach.") (quotation omitted); *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2201 (2020) (same); *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) (same). "The constitutional practice ... tends to negate the existence of the … power asserted here." *Printz* v. *United States*, 521 U.S. 898, 918 (1997).

Sixth, President Trump pointed to analogous immunity doctrines for legislators and judges. D.Ct. Doc. 74, at 16-18. For example, this Court recognized, in *Spalding* v. *Vilas*, that the doctrine of absolute judicial immunity extends to both "civil suit" and

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[2] *See*, *e.g.,* Gary L. Gregg II, *George W. Bush: Foreign Affairs*, UVA Miller Center, https://millercenter.org/president/-gwbush/foreign-affairs.

[3] See, e.g., Spencer Ackerman, *US Cited Controversial Law in Decision to Kill American Citizen by Drone*, The Guardian (June 23, 2014), https://www.theguardian.com/world/2014/jun/23/us-justification-drone-killing-american-citizen-awlaki.

"indictment." 161 U.S. 483, 494 (1896) (quoting *Yates* v. *Lansing*, 5 Johns. 282, 291 (N.Y. 1810) (Kent, C.J.)); *see also United States* v. *Chaplin*, 54 F. Supp. 926, 928 (S.D. Cal. 1944). Likewise, in the context of legislative immunity, this Court has held that immunity for legislative acts extends to both civil liability and criminal prosecution. *Gravel* v. *United States*, 408 U.S. 606, 624 (1972) (holding that a legislator's conduct that lies "within the sphere of legitimate legislative activity" "may not be made the basis for a civil or criminal judgment"); *Johnson*, 383 U.S. at 180 (holding that a legislative floor speech cannot be "made the basis of a criminal charge against a Member of Congress").

Seventh, President Trump noted that "concerns of public policy, especially as illuminated by our history and the structure of our government," *Fitzgerald*, 457 U.S. at 747-48, support the recognition of criminal immunity. D.Ct. Doc. 74, at 18. The Presidency involves "especially sensitive duties," *Fitgerald*, 457 U.S. at 746 (citing *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); and *Stump* v. *Sparkman*, 435 U.S. 349 (1978)). It requires "bold and unhesitating action." *Id.* at 745. The threat of future prosecution could "seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government." *Id.* (quoting *Spalding*, 161 U.S. at 498). "Defending [his] decisions, often years after they were made, could impose unique and intolerable burdens" on the President. *Imbler*, 424 U.S. at 425-26. The prospect of politically motivated criminal prosecution poses a greater deterrent to bold action than mere civil liability. Thus, immunity is particularly appropriate to protect the President's "maximum ability to deal fearlessly and impartially

with the duties of his office." *Fitzgerald*, 457 U.S. at 752.

President Trump then argued that each of the five categories of acts alleged in the indictment falls within the "outer perimeter" of his official duties as President. D.Ct. Doc. 74, at 21-45.

Separately, President Trump filed a motion to dismiss based on constitutional grounds, which argued, *inter alia*, that the indictment is barred by the Impeachment Judgment Clause and principles of double jeopardy because President Trump was impeached and *acquitted* by the U.S. Senate for the same and closely related conduct. D.Ct. Doc. 113, at 18-24.

III. The District Court's Decision.

On December 1, 2023—nine days after the close of briefing on the relevant motions—the district court issued its decision denying both of President Trump's motions. Pet.App. 1a-59a. On the question of presidential immunity, the district court held that the doctrine of absolute presidential immunity does not shield a former President from federal criminal prosecution for his official acts, and thus the court denied President Trump's claim of immunity *in toto*. Pet.App. 7a-38a. Because the district court held that the relevant immunity does not exist, it did not address whether the acts alleged in the indictment fall within the scope of the President's official duties. Pet.App. 37a.

Regarding President Trump's double-jeopardy argument, the district court held that "neither traditional double jeopardy principles nor the Impeachment Judgment Clause provide that a

prosecution following impeachment acquittal violates double jeopardy." Pet.App. 46a; *id.* 46a-53a.

On December 7, 2023, President Trump filed a timely notice of appeal. D.Ct. Doc. 177. On December 11, 2023, the Special Counsel filed a motion to expedite proceedings in the D.C. Circuit, and a petition for certiorari before judgment in this Court.

The D.C. Circuit granted the Special Counsel's motion to expedite the appeal, ordered accelerated briefing to close by January 2, 2024, and scheduled oral argument for January 9, 2024. *See* Order in No. 23-3228 (D.C. Cir. Dec. 13, 2023) (setting expedited briefing schedule to conclude by January 2, 2024); Order in No. 23-3228 (D.C. Cir. Dec. 18, 2023) (setting oral argument for January 9, 2024).

REASONS FOR DENYING THE PETITION

I. The Special Counsel Identifies No Extraordinary Circumstance That Justifies Deviation From Normal Appellate Practice or Requires Immediate Determination by This Court.

This Court's Rule 11 provides that a petition for certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. The Special Counsel emphasizes the "imperative public importance" of this case, but he provides virtually no explanation of why that importance "justif[ies] deviation from normal appellate practice" or "require[s] immediate determination in this Court." *Id.*

A. Prudential Considerations Weigh Against Certiorari Before Judgment.

As the Special Counsel acknowledges, a request for certiorari before judgment is "extraordinary." Pet. 10. This Court has often emphasized the value of "percolation," *i.e.*, allowing the lower courts to first carefully consider novel and difficult questions of law. "It often will be preferable to allow several courts to pass on a given … claim in order to gain the benefit of adjudication by different courts in different factual contexts." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). A rule "freezing the first final decision rendered on a particular legal issue" and "[a]llowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984).

Here, the Special Counsel urges that *no* "courts of appeals" should be allowed to "explore [the] difficult question[s] before this Court grants certiorari." *Id.* He is incorrect. "This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by" the D.C. Circuit. *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977). Such review often "eliminat[es] … many subsidiary, but still troubling, arguments" and "simplifie[s]" this Court's "task" by winnowing arguments through adversarial testing. *Id.*

Issuing the writ before judgment also "has the potential for producing splintered decisions. That potential is magnified when there has been no prior panel consideration of a case." *Belk* v. *Charlotte-Mecklenburg Bd. of Educ.*, 211 F.3d 853, 854-55 (4th Cir. 2000) (Wilkinson, C.J., concurring in the denial of

initial hearing en banc). Thus, "bypassing the winnowing function of the court of appeals" is something that this Court "routinely refuses to do." *Id.*

The Special Counsel notes that this appeal involves questions of extraordinary importance. "This case presents a fundamental question at the heart of our democracy," Pet. 2, that "only this Court can definitively resolve," *id.* at 3. "This case involves a paradigmatic issue of imperative public importance"—indeed, one that "is at the apex of public importance." *Id.* at 10. An erroneous denial of a claim of presidential immunity from criminal prosecution for official acts warrants this Court's review—in due course.

Yet *importance* does not automatically necessitate *speed*. If anything, the opposite is usually true. Novel, complex, sensitive, and historic issues—such as the existence of presidential immunity from criminal prosecution for official acts—call for more careful deliberation, not less. When a case "arouses keen interest," "courts should respond to that circumstance in a calm, orderly, and deliberative fashion in accordance with the best traditions of the law." *Belk*, 211 F.3d at 856 (Wilkinson, C.J., concurring in the denial of initial en banc consideration). "Judicial orders warrant the utmost respect when they are perceived by the public to have been reached in the most regular and careful manner." *Id.*

Indeed, the fact that this case arises in the vortex of political dispute warrants caution, not haste. Especially when they are considered too quickly, "[g]reat cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but

because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." *N. Sec. Co.* v. *United States*, 193 U.S. 197, 364 (1904) (Holmes, J., dissenting). This case, which is both "great" and "hard," *id.*, exemplifies the need for a cautious, measured, deliberative approach.

B. The Special Counsel Identifies No Compelling Reason for Haste.

To justify departing from these principles, the Special Counsel offers the naked assertion that the "public interest" demands that this appeal be decided in the current Term. Pet. 11. In fact, the Special Counsel requests a substantially compressed briefing schedule that would virtually guarantee a cramped, incomplete presentation of the issues. Mot. to Expedite ("Mot.") 5-6.

The Special Counsel justifies this request with vague references to the supposed "paramount public importance" of holding President Trump's potential criminal trial "as expeditiously as possible," Pet. 9; *see also id.* at 2 (same); *id.* at 4, 10. The Special Counsel demands "*immediate* resolution of the immunity question" so that "the trial [may] occur on an *appropriate timetable*." Pet. 11 (emphasis added).

But in an omission that speaks volumes, the Special Counsel never explains *why* March 4, 2024, is supposedly the only "appropriate timetable" for this historic prosecution. *Id.* That date has no talismanic significance. And the prospect that an interlocutory appeal of an immunity question might affect a pending trial date is a routine feature of such cases. "Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its

consequences if the public welfare or convenience will thereby be promoted." *Landis* v. *N. Am. Co.*, 299 U.S. 248, 256 (1936). "A mere assertion of delay does not constitute substantial harm. Some delay would be occasioned by almost all interlocutory appeals." *United States* v. *Philip Morris, Inc.*, 314 F.3d 612, 622 (D.C. Cir. 2003), *jurisdictional ruling overruled by Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100 (2009).

Moreover, where, as here, the D.C. Circuit has dramatically expedited proceedings on appeal, "any delay will be minimized by [its] expedition in hearing [this] appeal. In short, there is no reason to believe a minor delay will substantially harm the United States." *Id.*

C. The Special Counsel's Request Creates a Compelling Appearance of Partisan Motivation.

The Special Counsel's extraordinary request, combined with its vague, threadbare justification, creates the compelling appearance of a partisan motivation: To ensure that President Trump—the leading Republican candidate for President, and the greatest electoral threat to President Biden—will face a months-long criminal trial at the height of his presidential campaign. The current potential trial date of March 4, 2024, falls the day before Super Tuesday, one of the most critical dates of the Republican primary calendar. Further, the Special Counsel's insistence that this Court decide the immunity question "during its current Term," Pet. 10, reflects the evident desire to schedule President Trump's potential trial during the summer of 2024—at the height of the election season. This is all in light of the fact that the case brought, and now sought to be

rushed, by the Special Counsel attempts to criminalize official acts taken by President Trump in late 2020 and early 2021, three years ago.

The Special Counsel's request, therefore, cannot avoid the appearance of partisanship. This Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com.* v. *New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States* v. *Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)). As soon as the Special Counsel's petition was filed, commentators from across the political spectrum observed that its evident motivation is to schedule the trial before the 2024 presidential election—a nakedly political motive. *See, e.g.,* Elie Honig, *Why Jack Smith Will Never Say the 'E' Word*, CNN (Dec. 16, 2023), https://www.cnn.com/videos/politics/2023/12/16/smr-honig-on-smith-vs-election-calendar.cnn (stating that "any fair-minded observer has to agree" that the Special Counsel is "acting based on the election schedule," which "crosses the line to the political"); Editorial Board, *Jack Smith and the Supreme Court*, WALL ST. J. (Dec. 16, 2023) ("The special counsel tries to drag the Justices into his political timetable for the Jan. 6 trial of Donald Trump."); Jason Willick, *Politics Are Now Clearly Shaping Jack Smith's Trump Prosecution*, WASH. POST (Dec. 12, 2023), https://www.washingtonpost.com/opinions/2023/12/12/special-counsel-jack-smith-politicized-prosecution/ ("Now, in a filing at the Supreme Court, Smith has all but announced that his prosecutorial timeline is controlled by the 2024 general election in which Trump is likely to be a candidate."); Byron York (@ByronYork), X (Dec. 11, 2023), https://twitter.com/ByronYork/status/1734305076582

244850?s=20 ("In SCOTUS request, Jack Smith repeatedly says it's super important Trump immunity issue be decided quickly. But he doesn't say *why* it must be decided quickly. Obviously, that is so Trump can be tried, convicted, and sentenced before 2024 election. Why not just say so?").

The Special Counsel thus confuses the public interest with a *partisan* interest of his superior, President Biden. The petition echoes "Charles Wilson, former president of General Motors, who is supposed to have said … 'what's good for General Motors is good for the country.'" *McConnell* v. *FEC*, 540 U.S. 93, 262–63 (2003) (Scalia, J, concurring in part and concurring in the judgment), *overruled by Citizens United* v. *FEC*, 558 U.S. 310 (2010). "Those in power, even giving them the benefit of the greatest good will, are inclined to believe that what is good for them is good for the country." *Id.* So also here, the Special Counsel—and the Biden Administration to which he reports—"are inclined to believe that what is good for them is good for the country." *Id.* Tens of millions of American voters plainly disagree—thus creating an electoral threat to "those in power," *id.*, that evidently drives this extraordinary request.

The Special Counsel's politicization of the trial schedule—including in this petition—departs from the best traditions of the U.S. Department of Justice. Those traditions call for prosecutors to *avoid* the appearance of election interference in the prosecution of political candidates. "[F]ederal prosecutors … may never make a decision regarding an investigation or prosecution, or select the timing of investigative steps or criminal charges, for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party."

U.S. Dep't of Justice, *Justice Manual* § 9-27.260 (2018), *at* https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.260. "Federal prosecutors and agents may never select the timing of any action, including investigative steps, criminal charges, or statements, for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party. Such a purpose is inconsistent with the Department's mission and with the Principles of Federal Prosecution." *Id.* § 9-85.500. The Special Counsel's extraordinary petition creates a strong appearance of a significant departure from those rules and aspirations.

Even worse, the Special Counsel's request threatens to tarnish this Court's procedures with the same appearance of partisanship. *See, e.g.,* Editorial Board, *Jack Smith and the Supreme Court*, Wall St. J. (Dec. 16, 2023) ("The special counsel tries to drag the Justices into his political timetable for the Jan. 6 trial of Donald Trump. … [N]ow he is dragging the Supreme Court into the political thicket."). The Special Counsel urges the Court to jettison venerable principles of prudence, leapfrog the ordinary process of appellate review, and rush headlong to decide one of the most novel, complex, and momentous legal issues in American history. In doing so, the Special Counsel seeks to embroil this Court in a partisan rush to judgment on some of the most historic and sensitive questions that the Court may ever decide. The Court should decline that invitation.

D. The Cases the Special Counsel Cites Do Not Support the Petition.

The Special Counsel seeks to compare this case to a handful of cases in which this Court granted

certiorari before judgment. Pet. 11-12. None supports the Special Counsel here.

First, the Special Counsel relies heavily on *United States* v. *Nixon*, 418 U.S. 683 (1974). Pet. 2, 3, 11-12. *Nixon*, however, differs critically from this case in several respects. First, *Nixon* concerned President Nixon's assertion of executive privilege against a criminal subpoena. The far more momentous question whether the President himself could be indicted and be forced to stand trial for his official acts was not at issue. 418 U.S. at 686-90.

Second, *Nixon* did not write on a blank slate. Questions of the President's executive privilege in criminal proceedings had received extensive, thoughtful discussion in prior appellate decisions. These included the D.C. Circuit's en banc decision in *Nixon* v. *Sirica*, which had addressed the same privilege asserted against a grand-jury subpoena the year before. 487 F.2d at 700-22 (en banc) (cited in *Nixon*, 418 U.S. at 689, 708 & n.17); *id.* at 729 (MacKinnon, J., concurring in part and dissenting in part); *id.* at 762 (Wilkey, J., dissenting); *see also In re Sealed Case*, 121 F.3d 729, 742 (D.C. Cir. 1997). And they included Chief Justice Marshall's discussion of the subpoena for Thomas Jefferson's letters in the trial of Aaron Burr, *United States* v. *Burr*, 25 F. Cas. 187 (C.C. Va. 1807) (No. 14,694) (cited in *Nixon*, 418 U.S. at 707, 713-15), as well as 17 decades of historical practice in between, *see Vance*, 140 S. Ct. at 2423–24 (discussing nearly two centuries of history addressing criminal subpoenas issued to Presidents).

Here, by contrast, no current or former President has ever been criminally charged for his official acts before, and no appellate court has ever addressed whether a President has immunity from prosecution

for official acts. Because even a single opinion from the court of appeals is likely to assist this Court in its ultimate resolution of the issues, "[t]his litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by" at least *one* "court[] of appeals." *Train*, 430 U.S. at 135 n.26.

Third, the procedural posture in *Nixon* was very different—it involved an interlocutory dispute over a subpoena duces tecum issued for evidence in the criminal trial of third-party criminal defendants, who possessed their own constitutional and statutory speedy-trial rights. 418 U.S. at 686-88. Delay in that case, therefore, would have directly implicated the rights of specific third parties, *id.* at 688, not a vaguely defined "public interest," Pet. 11.

The Special Counsel's other cases fare no better. Pet. 12. Most involved prior written consideration of the issues on appeal by at least one Court of Appeals, and credible claims that delay would cause specific, irreparable injury to the petitioner or third parties. Neither factor is present here.

First, *Biden* v. *Nebraska* involved a petition for certiorari before judgment filed after the Eighth Circuit issued a "nationwide preliminary injunction" against the challenged student-debt-cancellation plan. 143 S. Ct. 2355, 2365 (2023). In entering the injunction, the Eighth Circuit had issued a decision addressing the crucial standing question. *Nebraska* v. *Biden*, 52 F.4th 1044 (8th Cir. 2022). Furthermore, the decision directly implicated the rights of third parties—millions of student borrowers. The government thus "asked this Court to vacate the injunction or to grant certiorari before judgment 'to avoid prolonging this uncertainty for the millions of affected borrowers.'" *Nebraska*, 143 S. Ct. at 2365.

Next, *Department of Education* v. *Brown* adds nothing to the analysis, as it involved a challenge to the same policy that was decided the same day as *Nebraska*. 600 U.S. 551, 556 (2023) ("[W]e granted certiorari before judgment to consider this case alongside *Biden* v. *Nebraska*, No. 22–506, which presents a similar challenge to the Plan.").

In *United States* v. *Texas*, 599 U.S. 670 (2023), the Fifth Circuit had issued a detailed opinion denying the government's stay application that addressed both standing and the merits, and that conflicted with a recent decision of the Sixth Circuit. *Texas* v. *United States*, 40 F.4th 205, 229 (2022) (citing *Arizona* v. *Biden*, 31 F.4th 469, 472 (6th Cir. 2022) (Sutton, C.J.)). Thus, there were detailed opinions from two different Circuits, and the government faced specific, immediate irreparable harm from delayed review.

In *Whole Woman's Health* v. *Jackson*, 595 U.S. 30 (2021), the Fifth Circuit had issued a reasoned opinion addressing the issues in the context of emergency stay motions, *Whole Woman's Health* v. *Jackson*, 13 F.4th 434, 434-48 (5th Cir. 2021), and the petitioners claimed that delay would inflict specific irreparable harm on themselves and many third parties—*i.e.*, denial of access to abortions. *Jackson*, 595 U.S. at 36. Again, those factors are absent here.

Finally, in *Department of Commerce* v. *New York*, the district court had ruled on January 15, 2019, and "the census questionnaire needed to be finalized for printing by the end of June 2019." 139 S. Ct. at 2565. No such rigid, external deadline is present here.

E. The District Court Opinion Illustrates the Hazards of Hasty Decisionmaking.

In the district court, the government insisted on a highly expedited resolution of these questions. *See* D.Ct. Doc. 142, at 1. The district court obliged by issuing a ruling within nine days of the close of briefing on the motions. D.Ct. Doc. 162; Pet.App. 1a-59a. The result was a hasty decision that overlooked significant authorities and made a series of fundamental errors. This decision illustrates the hazards of resolving these complex, sensitive questions at breakneck speed. A handful of examples illustrates these deficiencies; the full account of them deserves careful briefing on the merits, both in the D.C. Circuit and in this Court.

First, the district court emphasized that "[n]o court … has ever accepted" the doctrine of criminal immunity. Pet.App. 7a. But no President has ever been indicted for official acts before. The absence of *any* historical precedent for this indictment—despite centuries of both motive and opportunity to indict former Presidents for their official acts—is "[p]erhaps the most telling indication of a severe constitutional problem" with this prosecution. *Seila Law*, 140 S. Ct. at 2201 (quoting *Free Enterprise Fund*, 561 U.S. at 483); *see also NFIB*, 595 U.S. at 119; *Printz*, 521 U.S. at 918. The district court ignored these precedents.

Second, the district court held that the absence of an express provision in the Constitution granting the President official immunity implies that no such immunity exists. Pet.App. 8a-9a. "There is no 'Presidential Immunity' Clause," the district court reasoned, and "[t]he lack of constitutional text is no accident." *Id.* at 8a. But this reasoning would entail that the President has no immunity from *civil* suit as

well, which contradicts this Court's precedent. *Fitzgerald*, 457 U.S. at 747-49. *Fitzgerald* upheld absolute presidential immunity from civil liability "in the absence of explicit constitutional or congressional guidance," based on principles of separation of powers, history, and common law. *Id.* at 747; *see also id.* at 748, 749. Moreover, the district court's logic would invalidate other well-established immunity doctrines for executive officials, state officials, police, prosecutors, and judges—all of whom enjoy versions of immunity not expressly provided in the Constitution. *See id.* at 751-52 (holding that, for "prosecutors and judges … absolute immunity now is established").

Third, the district court cited Alexander Hamilton's writings in The Federalist No. 69 as supposedly repudiating presidential immunity. Pet.App. 9a. But, as noted above, a more specific statement in the same essay supports President Trump and contradicts the district court's holding: "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 (Hamilton) (emphasis added).

Fourth, the district court reasoned that criminal immunity would lead to "implausibly perverse results," Pet.App. 16a, and that "the former President would be utterly unaccountable for their crimes," *id.* This is incorrect. The Constitution does not "license a President's criminal impunity," *id.*; rather, it establishes a powerful structural check to prevent political factions from abusing the formidable threat

of criminal prosecution to disable the President and attack their political enemies. Under the Constitution's balanced, structural approach, a President *may* be prosecuted, but only if he is *first* impeached, tried, and convicted in the U.S. Senate. U.S. CONST. art. I, § 3, cl. 7. The Constitution opens the door to such prosecutions, but requires a strong political consensus—*i.e.*, the participation of the political branches, including a supermajority of the U.S. Senate, the Republic's traditional "cooling saucer"—before such a drastic action can be taken. *See id.* Accordingly, this Court has repeatedly emphasized that *impeachment*, not criminal prosecution, provides the principal check and deterrent to a President's malfeasance in his official acts. *Clinton* v. *Jones*, 520 U.S. 681, 696 (1997); *Fitzgerald*, 457 U.S. at 757 ("A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment.").

The district court rejected this reasoning by citing the possibility of marginal cases where presidential crimes might escape enforcement. Pet.App. 16a. But every structural protection in the Constitution necessarily creates the possibility of under-enforcement—that is a feature, not a bug, of the separation of powers. "While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty." *Morrison* v. *Olson*, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting).

Fifth, the district court reasoned that immunity from criminal prosecution is unnecessary, as a President can simply avoid committing federal crimes

and have nothing to worry about: "Every President will face difficult decisions; whether to intentionally commit a federal crime should not be one of them." Pet.App. 22a. The Founders, by contrast, correctly anticipated the risk of manipulation of vaguely defined "crimes" by political factions. James Madison, for example, explained the provision of a specific definition of "Treason" in Article III, § 3, clause 1, by stating that it was devised to prevent political factions from devising "*new fangled and artificial treasons*, [which] have been the great engines, by which violent factions, the natural offspring of free governments, have usually wreaked their alternate malignity on each other." THE FEDERALIST NO. 47 (Madison) (emphasis added). Alexander Hamilton likewise cautioned that trial of "the misconduct of public men" should be assigned to the Senate, not the courts, because "[t]hey are of a nature which may with peculiar propriety be denominated POLITICAL," and "[t]he prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties, more or less friendly or inimical, to the accused." THE FEDERALIST NO. 65 (Hamilton).

Then-Attorney General Robert Jackson expounded the same concern in 1940, emphasizing the sweeping breadth of modern federal criminal statutes:

> Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the

> commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm … that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

R. Jackson, *The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys* (April 1, 1940) (quoted in *Morrison*, 487 U.S. at 728 (Scalia, J., dissenting)).

The indictment of President Trump fits this bill. It radically and unlawfully stretches the language of broadly phrased criminal statutes to reach conduct—speech and political advocacy—never before covered by them. D.Ct. Doc. 1, at 42-44. It provides yet another example of a federal prosecutor adopting an overbroad interpretation of a vaguely phrased criminal statute, which "cast[s] a pall of potential prosecution" over "even the most commonplace" forms of "democratic discourse." *McDonnell* v. *United States*, 579 U.S. 550, 575 (2016).

Sixth, President Trump warned that breaking the tradition against prosecuting Presidents for official acts will inevitably lead to future cycles of prosecutions of Presidents, "ushering in a new era of political recrimination and division." D.Ct. Doc. 74, at 11. The district court dismissed this concern: "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." Pet.App. 24a. Yet the recent history of presidential impeachment undermines the district court's blithe assumption that this case will likely be a historically isolated instance. In the 209 years from 1789 to 1998, there was one impeachment of a President—Andrew Johnson in 1868. In the last 25 years, there have been three, with a fourth currently under consideration by the U.S. House of Representatives. Presidential impeachment is changing from virtually unthinkable to a fixture of interbranch politics. And impeachment faces formidable structural checks—it must be voted by a majority of the House, with a supermajority of the Senate required to convict. Criminal prosecution, by contrast, requires only the action of a single enterprising prosecutor and a compliant grand jury.

Seventh, citing *United States* v. *Lee*, 106 U.S. 196, 220 (1882), the district court likened presidential immunity from criminal prosecution to the "divine right of kings," and held that "'[n]o man in this country,' not even the former President, 'is so high that he is above the law.'" Pet.App. 36a; *id.* at 29a-30a (also citing *Lee*). But in *Butz* v. *Economou*—also citing *Lee*—this Court rejected the same reasoning and held that absolute immunity does not render an official "above the law." 438 U.S. 478, 506 (1978). Quoting *Lee*'s statement that "no man … is above the law," *Butz* held that this principle is *consistent* with the recognition of absolute immunity where, as here, history and public policy warrant immunity. "In light of this principle," *Butz* held, "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." *Id.* *Butz* then stated that absolute

immunity applies in "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Id.* at 507. The Presidency, of course, presents the most "essential" of all cases. *Id.*; *see also Fitzgerald*, 457 U.S. at 750 (citing *Butz* and holding that "[t]he President's unique status under the Constitution distinguishes him from other executive officials"). Likewise, the district court's reasoning overlooks that, under the Impeachment Judgment Clause, a former President *is* subject to prosecution for official acts—provided that he is first impeached and convicted by the political branches.

II. The Court Should Reject the Special Counsel's Proposed Briefing Schedule.

For the reasons discussed above, even if this Court grants certiorari before judgment, which it should not, the Court should reject the Special Counsel's proposed briefing schedule, which would require briefing the merits of these issues on a radically compressed timetable. Mot. 5-6. Instead, if and when it considers these issues, the Court should grant briefing on the ordinary schedule. What is "imperative," Pet. 2, is that this case be decided *correctly*, not that it be decided quickly. "'Haste makes waste' is … right so often." *Kusay*, 62 F.3d at 195.

CONCLUSION

The petition for writ of certiorari before judgment should be denied.

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Respectfully submitted,

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