No. 23A745

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, APPLICANT

v.

UNITED STATES OF AMERICA

RESPONSE IN OPPOSITION
TO APPLICATION FOR A STAY OF THE MANDATE
OF THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JACK L. SMITH
Special Counsel
J.P. COONEY
Deputy Special Counsel
MICHAEL R. DREEBEN
Counselor to the Special Counsel
Counsel of Record
JAMES I. PEARCE
Assistant Special Counsel
Department of Justice
950 Pennsylvania Ave. NW
Room B-206
Washington, D.C. 20530-0001
SCO_JLS_SupremeCtBriefs
@usdoj.gov
(202) 305-9654

IN THE SUPREME COURT OF THE UNITED STATES

No. 23A745

DONALD J. TRUMP, APPLICANT

v.

UNITED STATES OF AMERICA

RESPONSE IN OPPOSITION
TO APPLICATION FOR A STAY OF THE MANDATE
OF THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Special Counsel, on behalf of the United States, respectfully submits this opposition to the application for a stay of the mandate of the court of appeals pending the filing and disposition of applicant's forthcoming petition for a writ of certiorari.[1] The stay should be denied because of applicant's failure to meet this Court's settled standards. The application stems from an indictment returned by a grand jury against applicant, a former President of the United States, charging him with federal crimes committed in an alleged effort to perpetuate himself in power and prevent the lawful winner of the 2020 Presidential election from taking

[1] Pursuant to 28 U.S.C. 518(a), and in accordance with 28 C.F.R. 600.4(a), 28 C.F.R. 600.7(a), and Department of Justice Order No. 5559-2022 (Nov. 18, 2022), the Special Counsel has been authorized to conduct litigation before this Court on behalf of the United States in this matter.

office. The charged crimes strike at the heart of our democracy. A President's alleged criminal scheme to overturn an election and thwart the peaceful transfer of power to his successor should be the last place to recognize a novel form of absolute immunity from federal criminal law. Applicant seeks a stay to prevent proceedings in the district court from moving towards trial, which the district court had scheduled to begin on March 4, 2024, before applicant's interlocutory appeal necessitated postponement of that date. Applicant cannot show, as he must to merit a stay, a fair prospect of success in this Court.

Nor can applicant show that the balance of equities or the public interest favors continued delay of the criminal proceedings. To the contrary, the equities and public interest strongly disfavor a stay. Applicant's interlocutory appeal placed the district court proceedings on hold, thus delaying the trial and verdict in this case. He has no entitlement to a further stay while seeking discretionary review from this Court. Delay in the resolution of these charges threatens to frustrate the public interest in a speedy and fair verdict -- a compelling interest in every criminal case and one that has unique national importance here, as it involves federal criminal charges against a former President for alleged criminal efforts to overturn the results of the Presidential election, including through the use of official power.

Recognizing that applicant's claim of immunity implicates fundamental issues about the role of the President, the government

filed a petition for a writ of certiorari before judgment to provide this Court with the opportunity to resolve applicant's immunity claim at the earliest possible juncture. The Court denied review. United States v. Trump, No. 23-624 (Dec. 22, 2023). To the extent that this denial reflected an inclination not to review applicant's claim of absolute immunity from federal criminal prosecution, the Court should likewise deny this application and any forthcoming petition -- especially now that the court of appeals has unanimously affirmed the denial of immunity in a thorough opinion that correctly rejects applicant's arguments.

If, however, this Court believes that applicant's claim merits review at this time, the government respectfully requests that it treat the application as a petition for a writ of certiorari, grant the petition, and set the case for expedited briefing and argument. An expedited schedule would permit the Court to issue its opinion and judgment resolving the threshold immunity issue as promptly as possible this Term, so that, if the Court rejects applicant's immunity claim, a timely and fair trial can begin with minimal additional delay. The government proposes a schedule that would permit argument in March 2024, consistent with the Court's expedition of other cases meriting such treatment.

STATEMENT

A. Background

From January 2017 until January 2021, applicant was the President of the United States. The indictment alleges that after

losing his campaign for re-election, applicant engaged in fraudulent conduct for the purpose of overturning the 2020 election and preventing the transfer of power.

On August 1, 2023, a federal grand jury sitting in the District of Columbia charged applicant in a four-count indictment. D. Ct. Doc. 1. Count One, which charges a conspiracy to defraud the United States, in violation of 18 U.S.C. 371, alleges that applicant, then a candidate seeking re-election to the presidency, conspired with, among others, several individuals outside the Executive Branch 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." D. Ct. Doc. 1 ¶¶ 1, 7, 8. The indictment further alleges that applicant sought to accomplish the conspiracy's objectives in five ways: using deceit toward state officials to subvert the legitimate election results in those States, id. ¶¶ 13-52; using deceit to organize fraudulent slates of electors in seven targeted States and cause them to send false certificates to Congress, id. ¶¶ 53-69; leveraging the Department of Justice to use deceit to have state officials replace the legitimate electoral slate with electors who would cast their votes for applicant, id. ¶¶ 70-85; attempting to enlist the Vice President to fraudulently alter the election results during the certification proceeding on January 6, 2021, and directing supporters to the Capitol to obstruct the proceeding,

id. ¶¶ 86-105; and exploiting the violence and chaos that transpired at the United States Capitol on January 6, 2021, id. ¶¶ 106-124. Counts Two and Three, which incorporate allegations from Count One, charge conspiracy and substantive violations of 18 U.S.C. 1512(c)(2) for corruptly obstructing the certification of the presidential election results on January 6, 2021. Id. ¶¶ 125-128. Count Four, which likewise incorporates the allegations from Count One, alleges that applicant conspired to violate voters' constitutional right to vote and have their votes counted, in violation of 18 U.S.C. 241. Id. ¶¶ 129-130.

B. Proceedings Below

1. After considering the government's proposal to begin the trial on January 2, 2024, and applicant's proposal to schedule trial for April 2026, the district court set trial to begin on March 4, 2024, seven months after indictment. The court explained that seven months provided applicant with sufficient time to prepare his defense while "ensur[ing] the public's interest in seeing this case resolved in a timely manner." D. Ct. Doc. 38, at 55 (Aug. 28, 2023).

Applicant moved to dismiss the indictment on the grounds, inter alia, that he enjoys absolute immunity from criminal prosecution for acts taken within the "outer perimeter" of his official responsibilities and that the indictment's allegations all fall within that scope; he also argued that "double jeopardy principles" and the Impeachment Judgment Clause, U.S. Const. Art. I, § 3, Cl.

7, barred his prosecution. See D. Ct. Doc. 74, at 8-45 (Oct. 5, 2023) (immunity); D. Ct. Doc. 113, at 18-24 (Oct. 23, 2023) (double jeopardy and Impeachment Judgment Clause). The district court rejected those contentions and denied applicant's motions to dismiss the indictment. 23-624 Pet. App. 7a-38a, 46a-53a.

On December 7, 2023, applicant filed a notice of appeal. At that time, 88 days remained of the seven-month period from indictment to the trial date. Recognizing that the effect of an appeal is to "automatically stay[] any further proceedings that would move this case towards trial or impose additional burdens of litigation on [applicant]," the district court stayed the "deadlines and proceedings" specified in its pretrial order, D. Ct. Doc. 186 at 2 (Dec. 13, 2023), and later vacated the trial date pending the mandate's return, Minute Order (Feb. 2, 2024).

2. The court of appeals granted the government's motion to expedite the appeal and then affirmed. Appl. App. 1A-57A. The court explained that "[f]or 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." Id. at 3A. The court observed that applicant's "alleged efforts to remain in power despite losing the 2020 election were, if proven, an unprecedented assault on the structure of our government," and it rejected applicant'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." Id. at 39A-40A. After a detailed analysis of applicant's reliance on constitutional text, structure, and history, the court concluded that the considerations identified by this Court in assessing Presidential immunity claims "compel the rejection of his immunity claim in this case." Id. at 57A.[2]

3. The court of appeals directed the clerk "to withhold issuance of the mandate through February 12, 2024," stating that "[i]f, within that period, [applicant] 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." Appl. App. 58A.[3]

---

[2] In light of its holding that applicant "is not entitled to categorical immunity from criminal liability for assertedly 'official' acts," the court did not decide whether all of the conduct charged in the indictment would fit that description, as applicant contended. Appl. App. 50A n.14. The court nevertheless found it "doubtful that 'all five types of conduct alleged in the indictment constitute official acts.'" Ibid. (quoting Appellant C.A. Br. 42).

[3] The judgment also provided that "[t]he 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." Appl. App. 58A.

ARGUMENT

Applicant seeks a stay of the mandate pending his filing of a petition for a writ of certiorari. That request should be denied. Now that the court of appeals has ruled against him, unanimously rejecting his interlocutory immunity appeal, the burden shifts to him to justify further delay while he seeks discretionary review in this Court. He cannot satisfy this Court's established standards.

To secure a stay, applicant must show "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam); Maryland v. King, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers). "[I]n a close case it may be appropriate to balance the equities -- to explore the relative harms to applicant and respondent, as well as the interests of the public at large." Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (citation and internal quotation marks omitted); Hollingsworth, 558 U.S. at 190. "[A]ssessing the harm to the opposing party and weighing the public interest" factors "merge when the Government is the opposing party." Nken v. Holder, 556 U.S. 418, 435 (2009).

Here, applicant's request fails for two interrelated reasons: first, he cannot show the requisite likelihood that this Court would reverse the judgment and sustain his extraordinary claim of absolute immunity; and, second, the serious harm to the government -- and to the public -- of postponing the resolution of the criminal charges against applicant outweighs any equities he can assert to preclude further pre-trial proceedings while he seeks certiorari. The thorough opinions of the courts below considering and unanimously rejecting his arguments -- and applicant's failure to point to any Founding Era suggestion of such absolute immunity, any former President making such a claim, or even any scholarly commentary positing such immunity -- underscore how remote the possibility is that this Court will agree with his unprecedented legal position. And the public interest in a prompt trial is at its zenith where, as here, a former President is charged with conspiring to subvert the electoral process so that he could remain in office. The Nation has a compelling interest in seeing the charges brought to trial. If, alternatively, the Court is inclined to review applicant's claim of absolute immunity, the government respectfully requests that the Court treat his application as a petition for a writ of certiorari, grant the petition, and expedite briefing and argument.

I. APPLICANT HAS FAILED TO ESTABLISH A FAIR PROSPECT OF SUCCESS

Applicant's position is that he is absolutely immune from federal criminal prosecution based on any conduct that falls within

the outer perimeter of his official duties as President, unless Congress has previously impeached and convicted him for the same conduct. That position finds no support in constitutional text, separation-of-powers principles, history, or logic. And if that radical claim were accepted, it would upend understandings about Presidential accountability that have prevailed throughout history while undermining democracy and the rule of law -- particularly where, as here, a former President is alleged to have committed crimes to remain in office despite losing an election, thereby seeking to subvert constitutional procedures for transferring power and to disenfranchise millions of voters.

The President, of course, "occupies a unique position in the constitutional scheme." Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982). The Constitution vests the "executive Power" in the President, ibid. (quoting U.S. Const. Art. II, § 1), and entrusts him with supervisory and policy duties "of utmost discretion and sensitivity," id. at 750. The President is "the only person who alone composes a branch of government." Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2034 (2020). The President's duties, however, do not operate in a realm without law. They exist within a framework of separated powers in which Congress makes laws, U.S. Const. Art. I; the President "shall take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3; and the Article III courts exercise the judicial power to "say what the law is," Marbury v.

Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

Applicant's novel immunity claim would "collapse our system of separated powers by placing the President beyond the reach of all three Branches." Appl. App. 40A. His immunity claim is especially at odds with our system of government as applied to this prosecution, where a former President is charged with criminal conduct intended to overturn the results of an election in order to perpetuate himself in office, in violation of Article II. See U.S. Const. Art. II, § 1, Cl. 1 (the President "shall hold his Office during the Term of four Years and * * * be elected" according to the procedures set forth in the Constitution); see Appl. App. 37A-40A (explaining the heightened constitutional interests implicated by this prosecution because of Article II's provisions for "vesting authority in a new President" and "the citizenry's interest in democratically selecting its President"). That alleged effort to frustrate the Constitution's provisions for transferring power to a lawfully elected successor -- and negate the will of voters -- would be, "if proven, an unprecedented assault on the structure of our government." Id. at 39A.

A. Separation-of-Powers Principles Provide No Support For Absolute Criminal Immunity For A Former President

This Court has long held that when constitutional text does not directly resolve a separation-of-powers issue implicating Executive Branch functions, judicial analysis requires assessing (1)

whether a congressionally imposed limitation on Presidential action "prevents the Executive Branch from accomplishing its constitutionally assigned functions," and (2) if the law has that effect, "whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977); see also Fitzgerald, 457 U.S. at 754 ("balanc[ing] the constitutional weight of the interest to be served [by an exercise of jurisdiction over the President] against the dangers of intrusion on the authority and functions of the Executive Branch"); United States v. Nixon, 418 U.S. 683, 707 (1974) (weighing Executive Branch interests in confidential communications against "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions").

The Framers did not provide any explicit textual source of immunity to the President. "The text of the Constitution explicitly addresses the privileges of some federal officials, but it does not afford the President absolute immunity." Appl. App. 44A (quoting Trump v. Vance, 140 S. Ct. 2412, 2434 (2020) (Thomas, J., dissenting)). Nonetheless, "the silence of the Constitution on this score is not dispositive." Nixon, 418 U.S. at 705 n.16. In Fitzgerald, this Court held that Presidential immunity from civil damages actions is a "functionally mandated incident of the President's unique office, rooted in the constitutional tradition of

the separation of powers." 457 U.S. at 749. In the present context, a weighing of the same considerations examined in Fitzgerald results in the opposite conclusion: applicant's claim of absolute immunity from federal criminal prosecution would harm, rather than promote, the separation of powers.

1. Fitzgerald's concern that potential exposure to private civil damages actions would chill a President's decision-making, to the detriment of the vigorous exercise of executive authority, does not apply to the context of federal criminal prosecution. In contrast to the unchecked potential for myriad suits from private citizens who feel aggrieved by Presidential action, federal criminal prosecutions are conducted by the Executive Branch itself, under the supervision of the Attorney General acting through professional prosecutors appointed "to assist him in the discharge of his duties." Nixon, 418 U.S. at 694. "The decision to prosecute a criminal case * * * is made by a publicly accountable prosecutor * * * under an ethical obligation, not only to win and zealously to advocate for his client but also to serve the cause of justice." Cheney v. United States District Court for the District of Columbia, 542 U.S. 367, 386 (2004). The government's actions are therefore afforded a presumption of regularity "in the absence of clear evidence to the contrary." United States v. Armstrong, 517 U.S. 456, 464 (1996) (citation omitted). No evidence of abusive federal prosecutions of former Presidents exists, and inherent

checks in the Executive Branch itself guard against any such breakdown in our criminal justice system. See pp. 17-18, infra; cf. United States v. Brewster, 408 U.S. 501, 508, 523-524 (1972) (rejecting Speech-or-Debate Clause objections to bribery prosecutions of Members of Congress by noting, inter alia, the absence of "a catalogue of abuses at the hands of the Executive" in prosecuting legislators).

Multiple structural constraints further limit the potential for abusive prosecutions of former Presidents. Federal felony prosecutions must be initiated by a grand jury, see U.S. Const. Amend. V, which is "a constitutional fixture in its own right" and "serv[es] as a kind of buffer or referee between the Government and the people." United States v. Williams, 504 U.S. 36, 47 (1992) (citation omitted). Grand 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 (citation and internal quotation marks omitted). And Article III courts stand ready to enforce due process prohibitions against improper prosecutions, ibid., and can be expected to review any claims by a former President "meticulous[ly]." Id. at 2430 (quoting Nixon, 418 U.S. at 702); see Armstrong, 517 U.S. at 464 ("a prosecutor's discretion is subject to constitutional constraints") (citation and internal quotation marks omitted).

Prosecutions are also subject to public scrutiny in

proceedings guaranteeing a defendant a fair trial, with an array of procedural rights. U.S. Const. Amend. VI. They are conducted under judicial supervision, with the government bearing the burden to prove its allegations beyond a reasonable doubt to a unanimous jury. United States v. Gaudin, 515 U.S. 506, 510 (1995). These established safeguards against unfounded federal prosecution sharply contrast with the potential multiplicity of private damages actions that concerned the Fitzgerald Court. Cf. Cheney, 542 U.S. at 386 (contrasting the criminal justice system's protections "to filter out insubstantial legal claims" with the absence of "analogous checks" in civil litigation). Given these institutional safeguards and constitutional constraints, applicant's speculative claim (Appl. 2) that future Presidents will be chilled from carrying out the duties of office by the remote prospect of post-Presidency federal criminal prosecution is unpersuasive.

History supports that conclusion. Even under applicant's view, from the inception of the Nation, all Presidents have understood that the commission of criminal acts in their use of official powers could potentially result in post-Presidency prosecution. Appl. 29 (conceding the possibility of prosecution after impeachment and conviction). Consequently, "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" that applicant fears "is already

in effect." Appl. App. 33A. Watergate confirmed that possibility. See pp. 27-28, infra. Yet no evidence of abusive or overreaching federal criminal investigations of former Presidents has emerged, let alone evidence of chill in the Oval Office arising from fear of unwarranted prosecution.[4]

Likewise, applicant's claim (Appl. 1, 21-22) that history supports his position because no former President was previously prosecuted disregards the "unprecedented" scale, nature, and seriousness of his alleged crimes -- a fraudulent effort to stay in office in defiance of the will of the electorate. Appl. App. 39A. The conduct alleged in the indictment is of unparalleled gravity. Applicant's efforts to compare the present charges to acts by past Presidents that (he asserts) could have been prosecuted is deeply flawed. See Appl. 22-23 (citing secondary sources collected in his brief in the court of appeals). Applicant makes no effort to examine the specifics of any criminal statutes, consider unique legal defenses, or -- critically important -- address the threshold

[4] Applicant cites no source from any post-Presidency account of decision-making in the White House to support his conjecture about chill -- even after the Watergate episode removed any doubt that former Presidents could potentially be prosecuted. And his speculation based on recent experience with impeachment is a flawed comparator. Appl. 25. Applicant ignores the intrinsically political character of that process, which involves impeachment by the House and trial in the Senate, in contrast to the legal character of criminal prosecution, which takes place under judicial supervision in the courts and is bounded by the many institutional checks against potential abuses. See pp. 23-24, infra.

requirement that "the admissible evidence will probably be sufficient to obtain and sustain a conviction" as is necessary for prosecutors to bring federal criminal charges. See U.S. Dept. of Justice, Justice Manual § 9-27.220 (2023) (Principles of Federal Prosecution). Accusations leveled in political discourse do not constitute evidence.

To credit applicant's fear that future Presidents will be cowed by opponents' threats to bring unfounded indictments, one would have to assume that a host of institutional actors -- the Attorney General, career federal prosecutors, grand jurors, petit jurors, and federal judges -- would all abandon their oaths of office and allow baseless, vindictive prosecutions to proceed. That dystopian vision runs contrary to the checks and balances built into our institutions and the framework of the Constitution. Those guardrails ensure that the legal process for determining criminal liability will not be captive to "political forces," as applicant forecasts. Appl. 11 (emphasis added).

Applicant overlooks how these checks have worked in the past. For instance, former President Reagan was subject to criminal investigation for Iran/Contra, with the responsible federal prosecutor determining that the evidence did not warrant prosecution.[5]

[5] "But because a President, and certainly a past President, is subject to prosecution in appropriate cases, the conduct of President Reagan in the Iran/contra matter was reviewed by

More recently, then-Attorney General William Barr rebuffed calls "to use the criminal justice system as a political weapon"; "[i]t cannot and will not be a tit-for-tat exercise."[6] See also U.S. Dept. of Justice, Justice Manual § 9-27.260 (2023) (prosecutors "may not be influenced by" such factors as the person's "political association, activities, or beliefs"). Those examples illustrate the resilience of the Presidency and the vitality of institutional safeguards to protect against abuses. Applicant provides no basis for believing that Attorneys General -- members of the Executive Branch themselves -- would permit groundless prosecutions of former Presidents that would damage the Presidency as an institution. To the contrary, Attorneys General have every incentive to protect that institution. Speculative fears of chilling Presidential action based on threats by "political opponents" to seek "indictment by a future, hostile Administration, for acts that do not warrant any such prosecution," Appl. 2, are insufficient to support applicant's extraordinary claim that a President must be absolutely immune from any criminal accountability in order for that office

---

Independent Counsel against the applicable statutes. It was concluded that President Reagan's conduct fell well short of criminality which could be successfully prosecuted." 1 Lawrence E. Walsh, Final Report Of The Independent Counsel For Iran/Contra Matters: Investigations and Prosecutions, Chap. 27 (Aug. 4, 1993), available at https://irp.fas.org/offdocs/walsh/chap_27.htm.

[6] Matt Zapotosky, Barr says he does not expect Obama or Biden will be investigated by prosecutor reviewing 2016 Russia probe, Wash. Post (May 18, 2020).

to function.

Finally, Applicant's speculation that denying him absolute immunity will lead to chilling is belied by the longstanding position of the Department of Justice that a President may be prosecuted "once [his] term is over or he is otherwise removed from office by resignation or impeachment." Memorandum from Randolph D. Moss, Assistant Atty. Gen., Office of Legal Counsel, to the Atty. Gen.: A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 255 (Oct. 16, 2000). While a sitting President has temporary immunity, ibid., the Executive Branch itself has disavowed the position that former Presidents must be placed above the law with a novel immunity in order for the Presidency to survive. Former Presidents have likewise acknowledged that they may be prosecuted after leaving office. See, e.g., Resp. Br. United States v. Nixon, No. 73-1766, 1974 WL 174855, at *98 (June 21, 1974) ("[A President] can be indicted after he leaves office at the end of his term or after being 'convicted' by the Senate in an impeachment proceeding."). Applicant makes no effort to square his position with that established view.

2. A powerful interest on the other side of the scales is the need to "vindicate the public interest in an ongoing criminal prosecution." Fitzgerald, 457 U.S. at 754. This Court has frequently recognized the compelling public interest in enforcing the

criminal law, explaining that "the primary constitutional duty of the Judicial Branch [is] to do justice in criminal prosecutions." Nixon, 418 U.S. at 707; see also Cheney, 542 U.S. at 384 (recognizing that the "commitment to the rule of law is nowhere more profoundly manifest" than in criminal justice) (citation and ellipsis omitted). And here the Executive Branch's decision to enforce laws enacted by Congress places those branches' constitutional roles at odds with applicant's immunity claim. Separation-of-powers considerations thus cut against recognizing an absolute immunity that contradicts our constitutional heritage by placing the President "above the law." United States v. Lee, 106 U.S. 196, 220 (1882); see also Vance, 140 S. Ct. at 2432 (Kavanaugh, J., concurring) (the principle that no one is above the law "applies, of course, to a President").

These considerations are heightened, as the court of appeals explained, by the exceptionally strong constitutional interest in enforcing the law when a former President is charged with having committed crimes in a bid to retain power despite having lost the election. Appl. App. 37A-40A. The conduct alleged in the Indictment, if proved at trial, represents a concerted effort to violate the Constitution's Term-in-Office Clause, see U.S. Const. Art. II, § 1, Cl. 1 (elected President "shall hold his Office during the Term of four Years"), and the President's duty to "take Care that the Laws be faithfully executed," id., § 3. The proposition that

a former President is immune from federal criminal liability for conduct that would overturn his electoral defeat contravenes bedrock constitutional principles and threatens democracy itself. Applicant never acknowledges the constitutional cost of insulating a former President from criminal accountability for that conduct.[7]

3. A balance of these considerations therefore weighs against applicant's conjecture that "[w]ithout immunity from criminal prosecution, the Presidency as we know it will cease to exist." Appl. 2; id. at 10-11. Only one historical precedent bears relevant comparison to the Indictment's allegations. During the Nixon Presidency, misconduct in the White House intended to harm political rivals and keep the Administration in power led to a criminal investigation, federal indictment of the Watergate conspirators, and the naming of then-President Nixon as an unindicted co-conspirator and his subsequent acceptance of a pardon for all criminal

[7] A sufficient basis for resolving this case would be that, whatever the rule in other contexts not presented here, no immunity attaches to a President's commission of federal crimes to subvert the electoral process. See Amici Br. of John Danforth et al., at 7. The court of appeals' analysis was "specific" to the allegations that applicant conspired to "overturn federal election results and unlawfully overstay his Presidential term," Appl. App. 31A, and a stay can be denied on that basis alone, leaving for another day whether any immunity from criminal prosecution should be recognized in any circumstances. See Gov't C.A. Br. 45-49 (explaining that foreign affairs are not implicated in this case); cf. Nixon, 418 U.S. at 707, 710, 712 n.19 (reserving whether an absolute presidential-communications privilege might exist for military, diplomatic, or national security secrets).

offenses arising from his conduct. Yet no later prosecutions of former Presidents ensued -- until applicant's indictment 50 years later for allegedly seeking to thwart the political process and perpetuate himself in power. The Nation's tradition is therefore clear: Presidential conduct that violates the criminal law to achieve the end of remaining in power may be subject to a prosecution. That possibility should not chill legitimate Presidential conduct.

B. The Impeachment Judgment Clause Does Not Make Senate Conviction A Prerequisite To Criminal Prosecution

Applicant's reliance on the Impeachment Judgment Clause, U.S. Const. Art. I, § 3, Cl. 7, is misplaced.[8] Appl. 16, 20, 28-29. In applicant's view, that Clause immunizes a former President from prosecution unless he has first been impeached by the House and convicted by the Senate for the same or closely related official conduct that forms the basis for a federal indictment. That argument lacks merit.

The text of the Impeachment Judgment Clause affords no support to a rule of immunity for Presidents who have not been impeached

[8] The Impeachment Judgment Clause states: "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.

and convicted for the same official acts. The first part of the Clause clarifies and limits the scope of Congress's authority to remove federal officers: Congress's remedies are restricted to removal from office and disqualification from holding office in the future. Punishment authority is reserved for the ordinary process of the law. The second part of the Clause underscores that dichotomy: despite conviction after an impeachment trial, a party convicted "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." The text is thus clear that an official who is impeached and convicted is still exposed to criminal prosecution in the courts of law -- that is the import of the Clause's use of the word "nevertheless."[9] But as the court of appeals noted, "[t]he text says nothing about non-convicted officials." Appl. App. 44A.

Despite this silence, applicant contends (Appl. 28-29) that impeachment by the House and conviction by the Senate must precede prosecution. That contention fundamentally misunderstands the

[9] If the reading applicant proposes were correct, one would have expected the Framers to have used precise language -- such as "shall consequently be liable" -- to express it. Instead, they used the very different word "nevertheless." See Robert G. Dixon, Jr., Ass't Atty. Gen., Office of Legal Counsel: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office, at 3 (Sept. 24, 1973) (the Clause "does not say that a person subject to impeachment may be tried only after the completion of that process. Instead, the constitutional provision uses the term 'nevertheless.'").

distinct roles that impeachment and criminal prosecution play. The Framers separated the legislative remedy of impeachment from the judicial remedy of imposing criminal judgments for sound reasons. The impeachment process is, by design, a political remedy for the dangers to governance posed by an office holder who has committed "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. Art. II, § 4. Congress is well suited to weigh the need for and costs of removal of an official from office by evaluating his fitness for continued or future exercise of governmental power. That process does not depend on rigorously adjudicating facts and applying law; it is inherently political. The courts, in contrast, operate according to law and due process, with the proceedings subject to appellate review, including in this Court.

The untenable implications of applicant's impeachment-first rule further undermine its plausibility. If applicant's interpretation were correct, all federal officers, not just the President, would have to be impeached and convicted before prosecution. But history reflects a clear separation between the two constitutionally distinct procedures. Although scores of federal officers have been criminally prosecuted throughout our history, fewer than two dozen officers have ever been impeached by the House, with only eight -- all federal judges -- convicted in the Senate. See Cong. Research Serv., The Impeachment Process in the House of

Representatives (Jan. 25, 2024). And in the few cases in which both procedures have been invoked, prosecution has regularly preceded impeachment. See, e.g., Nixon v. United States, 506 U.S. 224 (1993) (impeachment following prosecution of Article III judge). Multiple courts have rejected applicant's claim that criminal prosecution may occur only after impeachment and conviction.[10]

In addition, applicant's proposal would unjustifiably shield a former official from criminal accountability if his criminal conduct came to light only after the official left office. The Senate has never convicted a former official, with Senators often expressing doubt about their power to do so, see e.g. 167 Cong. Rec. S736 (daily ed. Feb. 13, 2021), casting further doubt on the feasibility of applicant's novel impeachment-first theory of criminal liability. And the Constitution itself refutes affording a special status to Presidents under the Clause; the Framers provided

[10] See United States v. Hastings, 681 F.2d 706, 710 (11th Cir. 1982) (rejecting the claim that the Impeachment Judgment Clause "creates a constitutionally mandated sequence for the prosecution of a federal judge" in which "first, Congress must act to remove him from office, and only then can the article III courts subject him to 'trial, judgment and punishment, according to law'"), cert. denied, 459 U.S. 1203 (1983); accord United States v. Claiborne, 727 F.2d 842, 845 (9th Cir.), cert. denied, 469 U.S. 829 (1984); United States v. Isaacs, 493 F.2d 1124, 1142 (7th Cir.), cert. denied, 417 U.S. 976 (1974); Appl. App. 43A (noting that the negative-implication reading of the Clause to impose a mandatory sequence of impeachment first, prosecution after, is a "'tortured' interpretation." (quoting Claiborne, 727 F.2d at 846).

a separate rule for Presidential impeachments in the immediately preceding clause (requiring the Chief Justice to preside, see U.S. Const. Art. I, § 3, Cl. 6), but wrote no similar Presidential exception into the Impeachment Judgment Clause.[11]

C. Neither Constitutional History, Practice, Nor Related Doctrines Support Absolute Criminal Immunity

Other sources of constitutional interpretation likewise afford no support to applicant's argument. See Fitzgerald, 457 U.S. at 740 n.19, 747-748 (considering framing era statements, history, and the common law in the separation-of-powers analysis).

1. The Framers devoted significant attention to ensuring that the President would be accountable for any misconduct, and the most relevant writings provide no support for immunity of the type that applicant claims. "James Wilson, a signer of the Constitution and future Justice of this Court, explained to his fellow Pennsylvanians that 'far from being above the laws, [the President] is amenable to them in his private character as a citizen, and in his public character by impeachment.'" Vance, 140 S. Ct. at 2434-2435 (Thomas, J., dissenting) (quoting 2 Debates on the Constitution 480 (J. Elliot ed. 1891)). "James Iredell, another future

[11] Applicant's related argument -- that his acquittal by the Senate shields him from prosecution -- fails for many of the same reasons. The text of the Clause contains no acquittal-bar rule. And applicant can point to no historical tradition embodying such a rule. See Appl. App. 50A-56A.

Justice, observed in the North Carolina ratifying convention that '[i]f [the President] commits any crime, he is punishable by the laws of his country.'" Id. at 2435 (Thomas, J., dissenting) (quoting 2 Debates on the Constitution 109 (J. Elliot ed. 1891)).

Likewise, Hamilton's essays in The Federalist treated impeachment as a safeguard against the abuse of power by an incumbent President -- who would also be liable to criminal punishment after removal or departure from office. Applicant relies (Appl. 29-30) on three of Hamilton's essays -- Federalist Nos. 65, 69 and 77 (C. Rossiter ed. 1961) -- but none addresses what applicant seeks to establish: that conviction by the Senate would be a necessary prerequisite to a former President's criminal prosecution. See Appl. App. 46A (refuting applicant's reliance on Federalist No. 69); Gov't C.A. Br. 60 (discussing all three essays).

2. Historical experience also refutes applicant's claim. Never in American history before this case has any President asserted that former presidents enjoy immunity from federal criminal prosecution for official acts. To the contrary, during Watergate, President Nixon was an unindicted co-conspirator in a prosecution charging White House officials with conspiracy to defraud the United States and to obstruct justice. Nixon, 418 U.S. at 687 n.2; see Vance, 140 S. Ct. at 2427 (recognizing that President Nixon was "under investigation" in Watergate). Those charges rested on a range of official acts involving the misuse of official

Presidential power. See United States v. Haldeman, 559 F.2d 31, 121-122 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). President Nixon resigned before impeachment proceedings began, yet no one suggested that he was immune from federal prosecution. To the contrary, President Ford's extension of a pardon, and President Nixon's acceptance of it, implied recognition that he faced potential criminal liability. See Gerald Ford, Presidential Statement at 7-8 (Sept. 8, 1974) (granting former President Nixon a "full, free, and absolute pardon * * * for all offenses against the United States which he * * * has committed or may have committed or taken part in during" his presidency);[12] Richard Nixon, Statement by Former President Richard Nixon at 1 (Sept. 8, 1974) (accepting "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");[13] see also Burdick v. United States, 236 U.S. 79, 90-91 (1915) (stating that acceptance of a pardon represents a "confession of guilt").

Despite the Watergate experience and a succession of Independent Counsels and Special Counsels, the suggestion that a former President has absolute immunity from federal criminal prosecution

---

[12] https://www.fordlibrarymuseum.gov/library/document/0067/1563096.pdf.

[13] https://www.fordlibrarymuseum.gov/library/document/0019/4520706.pdf.

finds little mention in any source before applicant's briefs in this case. And the Department of Justice, speaking for the Executive Branch, long ago rejected the idea that an impeachment acquittal barred federal criminal prosecution. See Randolph D. Moss, Asst. Atty. Gen., Office of Legal Counsel: 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 (Aug. 18, 2000). The absence of any such absolute immunity claim throughout our history weighs heavily against its novel recognition now. See Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201 (2020).

3. This Court has previously looked to common-law judicial and prosecutorial immunity in analyzing parallel claims of Presidential immunity. See Fitzgerald, 457 U.S. at 746-748; see also Vance, 140 S. Ct. at 2426. For judges and prosecutors, absolute civil immunity has never implied criminal immunity. Appl. App. 25A-30A. To the contrary, the Court has reasoned that despite absolute immunity from civil damages claims, judges and prosecutors are "subject to criminal prosecutions as are other citizens." Dennis v. Sparks, 449 U.S. 24, 31 (1980) (judges); Imbler v. Pachtman, 424 U.S. 409, 429 (1976) (prosecutors). The recognition that civil immunity does not imply criminal immunity for these officials has deep roots in the law. E.g., Ex Parte Virginia, 100 U.S. 339, 348 (1879). And exposure to criminal liability is one

of the justifications for civil immunity; despite immunity from private civil damages actions, criminal prosecutions exist to deter and provide accountability for crimes. This Court has thus "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." O'Shea v. Littleton, 414 U.S. 488, 503 (1974). "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.'" Ibid. (quoting Gravel v. United States, 408 U.S. 606, 627 (1972)).

The same principle applies here. If anything, the principle has its greatest force with respect to the President: an official whose vast constitutional powers invite the greatest potential to inflict harm on society if he abuses his office to commit crimes -- and whose violation of his constitutional oath reflects the greatest betrayal of the Nation's trust. "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." Appl. App. 36A-37A.

D. Applicant's Reliance On Marbury v. Madison Lacks Merit

Relying on the Vesting Clause, U.S. Const. Art. II, § 1, Cl. 1 ("The executive Power shall be vested in a President of the

United States of America"), and Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), applicant argues that the discretionary acts of the President "can never be examinable by the courts." Appl. 3, 12-13, 19, 21 (quoting Marbury, 5 U.S. (1 Cranch) at 166). Drawing from Marbury and other sources the proposition that a President's official acts are not subject to the injunctive power of Article III courts, applicant makes the leap to claiming that trying a former President for criminal violations committed through official acts "constitutes a core violation of the separation of powers," id. at 16. That is a non sequitur. It is true that courts cannot enter an injunction against a sitting President directing his performance of official acts, see id. at 14 (citing authorities and Department of Justice filings), but that protection against judicial direction of the President's ongoing conduct of office does not suggest that courts are disabled from holding a former President accountable when his actions violate federal criminal law.

Applicant's interpretation of Marbury cannot be squared with the long record of this Court's review of the lawfulness of Presidential acts. See Appl. App. 22A-24A. The exercise of judicial power to review Presidential acts dates from the early years of the Republic and continues to this day through suits against his subordinates. See, e.g., Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (Marshall, C.J.); Youngstown Sheet & Tube Co. v. Sawyer,

343 U.S. 579 (1952); see also Medellin v. Texas, 552 U.S. 491 (2008). Applicant concedes the point, but suggests that the review of official Presidential acts through the actions against the President's subordinates reflects judicial incapacity to exercise any authority "directly over the President's official acts." Appl. 19. That is incorrect. Although courts properly refrain from entering injunctions or declaratory judgments against a sitting President to control his official acts, see Franklin v. Massachusetts, 505 U.S. 788, 826-828 (1992) (Scalia, J., concurring), that restraint does not reflect the view that Presidents are immune from all judicial process. For example, this Court entertained a direct challenge to a Presidential order in a suit against the President in Trump v. Hawaii, 585 U.S. 667 (2018). Upon appropriate showings, Presidents, like other citizens, must produce official papers in response to a subpoena in a pending prosecution. See Nixon, 418 U.S. at 707. And Presidents, like other citizens, must comply with federal criminal law. Nothing in the respect appropriately shown to a sitting President's discretionary official acts implies that a former President has immunity from all personal accountability for crimes committed through the exercise of official power.[14]

[14] Applicant's critique (Appl. App. 16-21) of the court of appeals' reading of Marbury is misguided. The opinion simply concluded that applicant's alleged conduct fell outside of

Even applicant does not claim that Presidential discretion is a general license to violate applicable federal criminal law. Nor could he. Criminal conduct violates the President's duty to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3. The separation of powers involves checks and balances -- not a blank check for crimes a President might commit through official acts so long as he resigns from office, avoids impeachment and conviction, or conceals his criminal conduct until after the expiration of his term. See, e.g., Walter Dellinger, Asst. Atty. Gen., Office of Legal Counsel: Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges, 19 Op. O.L.C. 350, 357 n.11 (Dec. 18, 1995) (the Constitution "confers no power in the President to receive bribes"). And contrary to applicant's suggestion (Appl. 18), prohibiting a President from committing crimes does not restrict his vast range of discretion in carrying out his official responsibilities -- any more than prohibiting him from accepting bribes in his conduct of office intrudes on his legitimate discretion. While applicant does not claim that he had the right to violate the charged statutes, his position seeks the

---

Marbury's disavowal of judicial review of the President's "lawful discretionary acts." Appl. App. 21A. "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." Id. at 25A.

same result: absolute immunity from federal prosecution for those alleged criminal acts. That claim is not rooted in any of this Court's precedents or any valid separation-of-powers principle.

Finally, applicant's own position is fundamentally inconsistent with his reading of Marbury. He admits that courts can examine official Presidential acts if the former President has been impeached and convicted. Appl. 16, 20. If the judiciary can directly examine a former President's official acts in that context, Article III courts plainly have the constitutional authority and capacity to preside over such prosecutions.

II. THE PUBLIC INTEREST FAVORS DENIAL OF A STAY

The Nation has a compelling interest in the prompt resolution of this case. In all criminal cases, delay can be "fatal" to achieving just outcomes. Cobbledick v. United States, 309 U.S. 323, 325 (1940). As this Court has recognized, "[a]s the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade," and "[i]f the witnesses support the prosecution, its case will be weakened, sometimes seriously so." Barker v. Wingo, 407 U.S. 514, 521 (1972). Accordingly, delay "may work to the accused's advantage" and to the harm of the public. Ibid.

The district court weighed the relevant considerations in setting a trial date of March 4, 2024, in recognition of the public's "right to a prompt and efficient resolution of this

matter." D. Ct. Doc. 38, at 53 (Aug. 28, 2023). While the court later vacated the trial date in light of this appeal, it can restart the process to "ensure the public's interest in seeing this case resolved in a timely manner," id. at 55 -- likely in a trial occurring in three months or less from receiving the mandate -- if applicant's immunity claim is rejected. There is a national interest in seeing the crimes alleged in this case resolved promptly.

The stay equities do not favor applicant. His personal interest in postponing trial proceedings must be weighed against two powerful countervailing considerations: the government's interest in fully presenting its case without undue delay; and the public's compelling interest in a prompt disposition of the case. Applicant's asserted equities in avoiding further pretrial proceedings do not outweigh those interests. Nor does his assertion (Appl. 3-4, 33-38) that the First Amendment rights of "tens of millions of American voters" compel further delay in the criminal proceedings. To the contrary, the charges here involve applicant's alleged efforts to disenfranchise tens of millions of voters. The national

interest in resolving those charges without further delay is compelling.[15]

III. ALTERNATIVELY, THE COURT SHOULD TREAT THE APPLICATION AS A PETITION FOR A WRIT OF CERTIORARI, GRANT REVIEW, AND EXPEDITE THIS CASE

The government's petition for a writ of certiorari before judgment argued that this case "presents a fundamental question at the heart of our democracy," and "a quintessential example of 'an important question of federal law that has not been, but should be, settled by this Court.'" 23-624 Pet. 2, 12 (quoting Sup. C. R. 10(c)). The petition stated that "[i]t is of imperative public importance that [applicant's] claims of immunity be resolved by this Court and that respondent's trial proceed as promptly as possible if his claim of immunity is rejected." Id. at 2. This Court denied certiorari.

To the extent that the denial reflects that this Court is not inclined to review applicant's claim, no reason for a stay exists. If no reasonable probability exists that certiorari will be

[15] Applicant also asks this Court to stay the court of appeals' mandate "pending resolution of a petition for en banc consideration." Appl. 4; id. at 8, 38-39. This Court should reject that request for extended delay. The court of appeals is well positioned to assess whether potential en banc proceedings warrant a stay of its mandate. Applicant's bid for a protracted stay pending an en banc petition that he intends to file "in the ordinary course," id. at 38 -- presumably 45 days from the judgment, see D.C. Cir. R. 35(a)) -- serves no valid purpose other than to delay the resolution of his immunity claim and any ensuing trial.

granted, that provides a dispositive reason to deny a stay. And the Court is better situated to assess that question now that the court of appeals has thoroughly analyzed and rejected applicant's immunity claim.

Alternatively, if the Court is inclined to grant review, the government respectfully requests that it treat the application as a petition for a writ of certiorari and grant review on the question whether a former President is absolutely immune from federal prosecution for crimes committed while in office or is constitutionally protected from federal prosecution when he has been impeached but not convicted before the criminal proceedings begin. If the Court grants review, the government requests that the Court expedite briefing and argument. For all the reasons that the government stated in its petition for a writ of certiorari before judgment and in this response, the public interest weighs heavily in favor of this Court's issuance of its decision without delay. And in order for the Court to decide this case in its present Term, expedited briefing and argument is necessary.

This Court acted expeditiously to resolve a claim of presidential immunity and privilege in United States v. Nixon, 418 U.S. 683 (1974). See 23-624 Pet. 11-12 (describing the timeline of briefing, argument, and decision in Nixon). The United States respectfully submits that if this Court determines that the public and legal importance of resolving applicant's immunity claim

justifies a grant of certiorari, see id. at 10-11, the Court should also establish a schedule that reflects the public interest in a prompt resolution of this case, 23-624 Reply Br. 4-5.

The government suggests that if the Court grants review, it order that applicant's brief on the merits, and any amicus curiae briefs in support or in support of neither party, be filed on or before ten days after the grant of certiorari; that the government's brief on the merits and any amicus briefs in support, be filed seven days thereafter; and that the reply brief, if any, be filed five days thereafter. The Court's recent expedition in Trump v. Anderson, No. 23-719 (Jan. 5, 2024), reflects that this timeline is fair and feasible. Expedited briefing and argument would be appropriate given the parties' just-completed briefing of the same issues in the court of appeals on an equally expedited schedule.[16]

CONCLUSION

The application for a stay of the mandate should be denied. Alternatively, the Court should treat the application as a petition

[16] The court of appeals entered an order on December 13, 2023, requiring applicant to file his brief on December 23, 2023; the government to file its brief on December 30, 2023; and applicant to file his reply brief on January 2, 2024. See United States v. Trump, No. 23-3228 (D.C. Cir.). On December 18, 2023, the court scheduled oral argument for January 9, 2024, ibid., and issued its opinion on February 6, 2024.

for a writ of certiorari, grant the petition, and order expedited briefing and argument.

Respectfully submitted.

JACK L. SMITH
Special Counsel
J.P. COONEY
Deputy Special Counsel
MICHAEL R. DREEBEN
Counselor to the Special Counsel
JAMES I. PEARCE
Assistant Special Counsel

FEBRUARY 2024