No. 23A745

In the Supreme Court of the United States

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

ON APPLICATION FOR STAY OF THE MANDATE OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT

BRIEF OF ALABAMA AND 21 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF APPLICANT DONALD J. TRUMP

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INTEREST OF *AMICI CURIAE*

The States of Alabama, Alaska, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming respectfully submit this brief as *amici curiae* in support of Donald Trump's stay application.

The United States asks the Court to weigh the "national interest" in prompt prosecution against the "personal interest" of one man. Resp. 35. Those are not the equities at stake. Missing is the critical fact that the United States waited *thirty months* to prosecute President Trump. The United States claims "the public interest in a prompt trial is at its zenith" here, *id.* at 9, but never explains why it chose to forbear prosecution for *years*. Its newfound concern with "undue delay" rings hollow.

Worse, the sudden urgency has invited public speculation that this case has an improper purpose—to influence the 2024 election. *Amici* States represent millions of Americans, many of whom worry that the timing of this prosecution was calculated to silence or to imprison President Biden's political rival.

True or not, such fears are deeply corrosive. And by acquiescing in the rush to trial, the courts below have only amplified the perception of impropriety. Denying the stay would greenlight the prosecution to proceed at breakneck speed and to put the apparent frontrunner for the presidency on trial in the lead up to the election. Granting a stay would calm the fervor, reassure the public, and permit the normal and orderly review of these weighty issues. Properly understood, the public interest demands a stay.

INTRODUCTION & SUMMARY OF ARGUMENT

President Trump, the United States of America, and *Amici* States agree that this first-of-its-kind case "implicates fundamental issues about the role of the President." Resp. at 2, *USA v. Trump*, No. 23A745 (filed Feb. 14, 2023). The President's immunity from prosecution for his official acts and the effect of the Impeachment Judgment Clause have such profound significance that it would be inappropriate for any other court to have the final word. These questions beg to be "settled by this Court," Sup. Ct. R. 10(c), not left to percolate among lower courts. Before a former President faces a federal criminal trial for the first time in our Nation's history, this Court should decide whether such a trial is permitted by the Constitution.

The United States claims that time is of the essence. Yet for over two years following the actions alleged in the indictment, the United States declined to prosecute President Trump. Then something changed. Since August 1, 2023, the prosecution has been relentless in its demand to try President Trump "as promptly as possible." Resp. 36. To say the least, the timing is suspicious, and it warrants explanation. But the United States has never offered one. A speedy trial is a "compelling interest in every criminal case," we are told. *Id.* at 2. But that vague interest was not enough to warrant certiorari before judgment two months ago, and it is still not enough to launch a potentially unconstitutional trial before this Court's review. The prosecution's sole equitable argument fails.

It is perplexing that this case, which "presents a fundamental question at the heart of our democracy," *id.* at 36, has rocketed here in *just four months* after motion-

to-dismiss briefing, expedited appellate briefing and argument, an expedited appellate decision, and now the threat of an expedited mandate. What is the emergency? Neither the United States nor the courts below will say. But the public has its theory: Commentators across the political spectrum have connected the dots between the rush to trial and the looming November 2024 election. President Biden himself, in November 2022, declared that Donald Trump "will not take power …. I'm making sure he, under legitimate efforts of our Constitution, does not become the next President again."[1] It does not look good, and it looks worse when the prosecution presses every court reviewing President Trump's constitutional claims to move more quickly. This week, the prosecution's *amicus* said the quiet part out loud: "[T]his is not just any case," argued the Protect Democracy Project, because a stay might "delay the trial until after the 2024 election," "denying the voters relevant information." *Amicus* Br. at 2-3, No. 23A745 (filed Feb. 14, 2023); *see also id.* at 12-13.

It should go without saying that timing a criminal prosecution to influence an election is no way to protect democracy, and it is not a legitimate end of law enforcement. *See* Memorandum from Merrick Garland, Atty. Gen., to All Dep't Emps.: Election Year Sensitivities (May 25, 2022) ("Garland Memorandum"); U.S. Dept. of Justice, Justice Manual § 9-85.500 ("Federal prosecutors and agents may never select the timing of any action … for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party.").

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

Unfortunately, the appearance of bias—owing in no small part to President Biden's statements and the United States' inexplicable haste—has damaged the credibility of the President, the U.S. Department of Justice, and this prosecution in the eyes of the public.

This Court should refuse to play along. A stay and a normal appellate timeline would go a long way to mitigate the perception of impropriety. Doing so would be especially appropriate here, where the issue is the defendant's amenability to prosecution in the first place; the whole point of the interlocutory appeal is to avoid a trial that might violate the defendant's constitutional rights. Contrary to the prosecution's haste, the fact that the defendant is a former President is a reason to move carefully—to be sure the prosecution is constitutional from inception. And the fact that the defendant is potentially a *future* President is even more reason to ensure the appearance and reality of fairness.

ARGUMENT

I. A Stay Is Necessary To Restore A Semblance Of Normalcy.

A. The United States Induced the Courts to Proceed at Breakneck Speed, but its Urgency is Belied by its Own Delay.

The United States has one equitable argument—the generic public interest in prompt prosecution. But that interest is undermined by the United States' own multi-year delay in bringing this action. And the appearance of partisanship that pervades the timing of these proceedings flips the equities—the public interest lies *against* a prosecution that even appears timed to damage a political opponent.

1. If the public interest in a speedy verdict has "unique national importance here," Resp. at 2, then the United States should explain why it waited thirty months to start this case. The alleged events underlying the indictment began in the fall of 2020 and concluded in January 2021. The acts alleged are almost entirely within the public record. In filings below, the prosecution cited its "lengthy and thorough investigation," DE141 at 12, but at the same time, the United States defended its demand for a January 2024 trial on the ground that much of the discovery was composed of "publicly available litigation documents, open-source materials like tweets, [and] materials from the House Select Committee, the vast majority of which were already publicly available." DE38 at 12-13. The United States did not disclose the full timeline of its investigation, and it never explained why, if the public interest is at its "zenith," Resp. 9, the Special Counsel was not appointed for nearly two years. Without more, the United States cannot excuse its self-imposed delay, which heavily undercuts its appeal to the public need for prompt prosecution. *Cf. Russell v. Todd*, 309 U.S. 280, 287 (1940) (recounting "the principle that equity will not aid a plaintiff whose unexcused delay … would be prejudicial to the defendant").

According to public reporting, one reason for the delay is that the relevant agencies did not believe a crime had been committed. A Washington Post investigation found that there was no "formal probe of actions directed from the White House" for over a year.[2] And even when there was one, the Federal Bureau of

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[2] Carol D. Leonnig, et al., *FBI Resisted Opening Probe Into Trump's Role in Jan. 6 For More Than a Year,* Washington Post (June 20, 2023), https://www.washingtonpost.com/investigations/2023/06/19/fbi-resisted-opening-probe-into-trumps-role-jan-6-more-than-year/.

Investigation "stopped short of identifying the former president as a focus of that investigation." *Id.* So too "the Justice Department [had] declined to investigate the matter," and "attorneys at Main Justice declined a[] proposal that would have squarely focused prosecutors on documents that Trump [allegedly] used to pressure Pence not to certify the election." *Id.* After a year, the government's investigation "had not yielded any significant connection to Trump's orbit." *Id.*; *cf.* Resp. 17 (appealing to "guardrails" at the Department of Justice that "ensure that the *legal* process for determining criminal liability will not be captive to *political* forces") (internal quotation marks omitted).

The facts did not change, but President Biden's patience wore thin, according to a New York Times story purportedly "based on interviews with more than a dozen people, including officials in the Biden administration and people with knowledge of the president's thinking."[3] Reportedly, President Biden "confided to his inner circle that he believed former President Donald J. Trump was a threat to democracy and should be prosecuted … [through] decisive action over the events of Jan. 6, 2020." *Id.* Around the same time as the explosive April 2022 report in the Times, the Director of the FBI authorized a new criminal investigation into the "fake electors plot." Leonnig, *supra*. "Still, the FBI was tentative." *Id.*

The investigation underlying this case then reportedly accelerated immediately after President Trump announced his candidacy for the 2024

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[3] Katie Benner, et al., *Garland Faces Growing Pressure as Jan. 6 Investigation Widens*, New York Times (April 2, 2022), https://www.nytimes.com/2022/04/02/us/politics/merrick-garland-biden-trump.html.

presidential election on November 15, 2022. Leonnig, *supra.* According to the Times, President Trump's announcement "was the tipping point in a deliberation that ha[d] gone on for some time."[4] Three days later, the Special Counsel was appointed.[5] Within *four days*, the Special Counsel had issued subpoenas targeting communications of twenty or more individuals. Leonnig, *supra.* According to the Washington Post, many of the witnesses "hadn't heard from the FBI in almost a year" and "thought the case was dead." *Id.* Some of them were interviewed for the first time in 2023. *Id.*

Needless to say, none of these alleged reasons for the prosecution's delay have anything to do with the burdens of investigation. According to the newspapers, the public did not demand prosecution—the President did. But even putting aside that troubling allegation, it seems the real reason for delay was that for over a year, there simply was no investigation into President Trump. Federal agents, investigators, and prosecutors reportedly did not believe there was a real case. Consequently, it appears to have been the government's own beliefs—and principally, its own inaction—that caused the delay. But that self-imposed timeline is no reason for rushed review now, and it's no reason to deny a stay.

2. Once the United States came to court on August 1, 2023, its tune changed dramatically. While it insisted that "[n]ormal order should prevail," DE15 at 8, the

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[4] Katie Benner, *Garland had long opposed naming a special counsel, but the political dynamics for 2024 left him little choice*, New York Times (Nov. 18, 2022), https://www.nytimes.com/live/2022/11/18/us/trump-garland-special-counsel#garland-had-long-opposed-naming-a-special-counsel-but-the-political-dynamics-surrounding-2024-left-him-little-choice.

[5] *See* Dep't of Just., *Appointment of a Special Counsel* (Nov. 18, 2022), www.justice.gov/opa/pr/appointment-special-counsel-0; Department of Justice Order No. 5559-2022 (Nov. 18, 2022).

prosecution's fevered pitch told a different story. Nothing about this case would be normal. Almost immediately, the United States produced over ten million pages of discovery—documents and videos derived from countless investigations into the events of January 6, 2021, many of which may have little to do with the charges here. The prosecution suggested that the defense should be ready for trial by January 2024, and the court largely agreed—over strenuous objections from the defense.[6] Despite the defense's warning that there would be complex motions to dismiss, requiring extensive briefing, and an immunity argument that would result in a stay, DE38 at 52:1-9, the district court set trial for March 4, 2024.

The March trial date was dead on arrival. And if that fact was not obvious in August when the defense previewed its immunity argument, it certainly was clear by October when President Trump filed the motions at issue here.[7] But that did not stop the district court, the United States, its *amici*, and the media from portraying President Trump's arguments as attempts to thwart the March trial date. At a hearing on October 16, 2023, after President Trump had filed his immunity motion, the district court remarked that its "trial will not yield to the election cycle." DE142 at 2-3 (quoting DE103 at 20-21). And in this Court, one *amicus* claims that President Trump "seeks to use the appellate process to delay his trial *indefinitely*," so that he can "run for office unencumbered by … justice." Protect Democracy Project *Amicus*

[6] The district court discounted the burdens of trial preparation in this case based on its assumption that defense counsel would not "review all 12 million pages" anyway. DE38 at 23:10; *see also id.* at 28:10-15 ("I want to know … why you think that you need this time when, although there are 12 million pages of discovery, you and I both know … nobody's sitting there going through page by page.").

[7] The immunity issues so clearly warrant a stay that the district court granted one in a three-page order relying principally on two authorities. *See* DE186.

Br. at 1, 13 (emphasis added). For its part, the United States accuses President Trump of pursuing “continued delay,” “additional delay,” “further delay,” “extended delay,” and “undue delay.” *See, e.g.*, Resp. 2, 3, 8, 35, 36.

These criticisms are patently unfair, they beg the question, and they should play no role in the Court’s analysis. Despite the incantations of the United States, the March 4, 2024 trial date was not sacred. It may have great political significance, but delay past March, without more, is legally meaningless. The United States claims that delay can be “fatal” to a criminal case, Resp. 34, but it fails to explain why it makes a difference to *this* prosecution whether President Trump stands trial in March, July, or December. And, even if the March date mattered, the United States would have only itself to blame because this case could have been initiated two years ago. Finally, the March 4 trial date was never attainable in the first place. Delay was inevitable *because the district court picked March 4, 2024*, not because President Trump raised predictable defenses—ones his counsel, in fact, predicted in August. *Contra* Resp. at 4 (accusing President Trump of seeking a stay “to prevent proceedings in the district court from moving towards trial”). President Trump should not be punished for pursuing an interlocutory appeal, which delayed an unrealistic and insignificant trial date over which he had no control.

3. Not only is the purported “delay” manufactured by the belated prosecution and the arbitrary trial date, but “delay” may be just what this case needs to counteract the reasonable perception of irregularity. Rather than alleviate the taint caused by the prosecution’s unexplained zeal, the lower courts exacerbated it.

Without explanation, they did everything in their power to compress the timeline and facilitate the rush to trial. In these strange circumstances, "delay"—*i.e.*, an orderly consideration of these weighty constitutional issues—would be a welcome return to normalcy.

The abnormal progression of these proceedings began but did not end in the district court. President Trump raised the issues here in a motion to dismiss filed on October 5, 2023. DE74. On December 1, just two weeks after the reply brief was filed, the district court denied the motion, DE171, and President Trump noticed his appeal. Citing "common procedure," the United States asked the D.C. Circuit to give President Trump *ten days* to file an opening brief on appeal and *three days* to file any reply. CADC Doc. 2030867 at 2, 5-6. At the same time, the United States urged this Court to bypass "normal appellate practice" and grant certiorari before the D.C. Circuit even touched the case. *See* Pet. at 10, *USA v. Trump*, No. 23-624 (filed Dec. 11, 2023). Within one day of the certiorari petition, the D.C. Circuit immediately and completely acquiesced—giving the prosecution its requested schedule exactly, including two Saturday deadlines during the holidays. CADC Doc. 2031419. The D.C. Circuit ordered that schedule without waiting to see whether this Court would grant certiorari before judgment.

This Court rightly rejected the prosecution's extraordinary petition. Instead of explaining why this issue of "imperative public importance" demanded an "immediate determination" by this Court, Sup. Ct. R. 11, the United States had offered the mere tautology that if the Court did not decide the case immediately, it would have to

decide it later. Pet. at 9-11, *USA v. Trump*, No. 23-624 (filed Dec. 11, 2023). The bizarre petition failed on its face to satisfy Rule 11, paled next to past precedents involving war and hostages, and contradicted the federal government's position in other cases. *Amicus* Br. of Alabama and 18 States at 3-7, *USA v. Trump*, No. 23-624 (filed Dec. 20, 2023). Again, the United States invited observers to infer that the real reason for its urgency was politics, not justice.

The D.C. Circuit held oral argument one week after the close of briefing, and the panel issued a 57-page opinion within thirty days. Then, without explanation, the three-judge panel shortened President Trump's time to seek rehearing en banc. The federal rules contemplate that criminal defendants should have at least 14 days from judgment to seek rehearing, *see* Fed. R. App. P. 35(c), 40(a)(1). And the D.C. Circuit is normally more generous, providing "any party … 45 days" to seek rehearing in "all cases" in which the United States is a party. D.C. Cir. R. 35(a), *inc'g by ref.* Fed. R. App. P. 40(a)(1)(A). That would have made President Trump's petition for panel rehearing and/or rehearing en banc due on March 22, 2024. In normal circumstances, the mandate would not issue until March 29, 2024, at the earliest. *See* Fed. R. App. P. 41(b). And that's what the United States expected too. *See* Reply Br. 6, *USA v. Trump*, No. 23-624 (filed Dec. 21, 2023). But for unwritten reasons, these are not normal circumstances, and the D.C. Circuit threatened to issue the mandate if President Trump did not move *this Court* for a stay within six days. CADC Doc. 2038999. A stay applicant is usually required first to seek a stay in the court below, but the panel effectively rejected a stay before President Trump even asked for one.

B. The Unusual Urgency of the United States and the Courts Below Has Damaged the Public Trust; A Stay Would Begin to Repair It.

In the face of public accusations that the timing of this suit was calculated for political gain, the United States maintains that trying President Trump as soon as possible would be an unalloyed public good. But a prosecutor's promptness can be virtuous or vicious. And here, because of the suspicious timing, there is a danger that the public will permanently perceive ill motives behind this prosecution. Unfortunately, that stigma could taint not only this case, but also the institutions involved in it. These are public harms the Court should weigh in favor of a stay, which would quell the apparent emergency and reinstate order and regularity.

1. On November 9, 2022, the President of the United States was asked how he would assure allies that "the former President will not return."[8] The sitting President responded: "Well, we just have to demonstrate that he will not take power … if he does run. I'm making sure he, under legitimate efforts of our Constitution, does not become the next President again." *Id.* Whatever that means, it was not a promise to outshine President Trump on the campaign trail. It appeared to many to be a promise that President Biden would wield executive power for his political ends. Although the appointment of the Special Counsel overseeing this prosecution was designed to alleviate the appearance of bias, to many, the damage was already done. Writers and reporters across the political spectrum could not help but predict the electoral

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

ramifications of this case—some seeing it as an abuse of the justice system to debilitate the President's political rival.[9]

Instead of taking steps to reduce cloud of suspicion over this prosecution, the United States has magnified it by pursuing President Trump with unprecedented zeal. In other cases—even those factually and legally intertwined with this one—the United States has not opposed a defendant's request for more time. Take *Fischer*, a case which implicates at least two of the charges against President Trump,[10] and which merited certiorari review. *Fischer* has now been pending for almost three years, DE1, *United States v. Fischer*, No. 1:21-cr-00234-CJN (D.D.C. filed February 17, 2021). The government did not fight every extension in *Fischer*, and, in fact, sought one itself in this Court. *See* Motion, *Fischer v. United States*, No. 23-5572 (docketed Oct. 3, 2023). Nor did the United States seek certiorari before judgment or an expedited briefing schedule. No, the United States reserved those tactics for President Trump; the "powerful interest" in speedy trials suddenly activated halfway through 2023 for one defendant only. Resp. 19.

Professor Jack Goldsmith put it bluntly: "If this were any other defendant than Donald Trump, the rush to trial—which cannot possibly give the Trump legal team

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[9] *See, e.g.*, Jack Goldsmith, *The Consequences of Jack Smith's Rush to Trial*, Lawfare (Feb. 14, 2024); Elie Honig, *The Word Jack Smith Will Never Say*, New York Magazine (Jan. 19, 2024) ("Throughout the special counsel's D.C.-based January 6 prosecution of the former president, his primary tactical objective has been to beat the election clock."); *see also* Kyle Cheney, *Special counsel urges Supreme Court to end Trump's delay of federal election trial*, POLITICO (Feb. 14, 2024); Eric Tucker, *Federal judge in DC postpones Trump's March trial on charges of plotting to overturn 2020 election*, AP News (Feb. 2, 2024) ("Smith's team, meanwhile, is hoping to be able to prosecute Trump this year before the November election."); Benjamin Wittes, *Lawfare Live: Trump's Trials and Tribulations*, The Lawfare Institute (Dec. 14, 2023), at 41:30-42:15, youtube.com/watch?v=VT-pw2miQ8Q ("The reason the March 4th trial date matters is because of the November election date; otherwise we wouldn't really care.").

[10] *See* DE1, Indictment ¶¶125-28 (citing 18 U.S.C. § 1512(c)(2)).

adequate time to prepare its defense—would be deemed wildly unfair."[11] It "matters" whether these timing decisions are "influenced by the election, and, ultimately, by politics and political outcomes." *Id.* That be would wrong, for the prosecutor's duty "is to seek justice" and to guard against the influence of his own "political … interests." ABA Standards for Criminal Justice 3-1.2(b), 3-1.7(f) (4th ed. 2017). Indeed, the Justice Department's manual explicitly *forbids* what the United States is accused of doing here:

> 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.

U.S. Dept. of Justice, Justice Manual § 9-85.500 (emphasis added). "Simply put, partisan politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges." Garland Memorandum at 1. There is not "one rule for friends and another for foes." Benner et al., *supra* (quoting Attorney General Garland).

When this Court weighs the equities, it should consider the effect on the public's "confidence that [the Justice Department is] adhering to [its] responsibility to administer justice in a neutral manner." Garland Memorandum at 2. It is evident from the commentary, the media, and even public polling,[12] that the timing of this

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[11] Jack Goldsmith, *The Consequences of Jack Smith's Rush to Trial*, Lawfare (Feb. 14, 2024), https://www.lawfaremedia.org/article/the-consequences-of-jack-smith's-rush-to-trial.

[12] A majority of Americans believe "the prosecutions of Donald Trump … are politically motivated." *Harvard CAPS / Harris Poll* at 42 (January 2024), harvardharrispoll.com.

prosecution has tarnished the Justice Department's standing in the eyes of the American people. It would further erode that trust for the United States to persist in its rush to trial. A stay, on the other hand, would calm the waters. A stay would give this Court a chance to conduct a normal appellate review and restore some faith in the process. And regardless of the truth of the accusations, a stay would stem the appearance that the United States found a crime to fit the candidate.

2. Aside from the public trust in the Executive Branch, the federal judiciary may consider its own institutional interests in a case of this magnitude. It has not been lost on the public how the courts have moved with exceptional speed in this case.

The district court decided these novel and complex constitutional issues in just eight weeks; the court of appeals did the same. The appellate panel then preemptively denied a stay, restricted President Trump's ability to seek en banc review, and significantly accelerated the mandate. Respectfully, it does not appear that President Trump is being "treated exactly … [as] any other defendant would be treated." DE38 at 33:6-8 (Judge Chutkan); *see also id.* at 53:4-6;[13] Stay App'x 3 (assuring that "President Trump has … all of the defenses of any other criminal defendant").

Not to worry, the United States explains: "Article III courts stand ready to enforce due process prohibitions against improper prosecutions and can be expected to review any claims by a former President meticulously." Resp. 14 (cleaned up). Without irony, the United States promises President Trump "meticulous[]" review

[13] Moments after making that promise, the district court compared this case to "the Boston Marathon bombing" and "the September 11 attacks." *Id.* at 56:1-4. And in another proceeding, the district court hearing this case described the events of January 6 as "an attempt to violently overthrow the government" out of "blind loyalty to one person who, by the way, remains free to this day." DE50 at 2.

while simultaneously opposing certiorari, or, in the alternative, supporting only "expedited briefing and argument" and only this Term. Resp. 36-38.

Even if the timing of this prosecution and the appeal were entirely innocent, the courts below never explained their reasoning. The D.C. Circuit's briefing schedule was extraordinary on its face—the kind of schedule one expects in eleventh-hour capital litigation or on the eve of an election. Those are lawsuits in which plaintiffs allege imminent and irreversible damage, but the United States has made no comparable showing here, nor have the courts made findings that would justify the emergency. Again, the public is left to ascribe its own meaning to the court's silence.

This case involves serious questions of constitutional law, and the answers may shape our understanding of the American presidency for centuries. A stay would make clear that this Court will treat such novel issues "of great constitutional moment" with careful thought, not frenzied expedition. Reply Br. at 1, *USA v. Trump*, No. 23-624 (filed Dec. 21, 2023). Above the fray, this Court has no interest in rushing the trial of President Trump.

A stay is especially warranted where the defendant has raised an immunity from suit; the Court should not risk grave constitutional harm pending its review. Indeed, it "makes no sense for trial to go forward while [this Court] cogitates on whether there should be one." *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989). In cases involving qualified immunity, double jeopardy, and arbitration, courts "automatically stay their proceedings while the interlocutory appeal is ongoing." *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 742 (2023); *see also Mitchell v. Forsyth*, 472

U.S. 511, 526 (1985). It should be no different here. While the district court properly applied this principle to stay trial pending the D.C. Circuit's decision, this Court need not wait to see whether it would do so pending this Court's review. A stay here would be proper and normal—two qualities these proceedings have unfortunately lacked.

CONCLUSION

The Court should grant the stay of the D.C. Circuit's mandate pending the disposition of a petition for a writ of certiorari.

Respectfully submitted,

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