No. 23A745

IN THE

Supreme Court of the United States

PRESIDENT DONALD J. TRUMP,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

On Application for Stay of the Mandate to Be Issued by the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF SCHOLARS OF CONSTITUTIONAL LAW AS *AMICI CURIAE* IN OPPOSITION TO APPLICATION FOR STAY OF THE MANDATE

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors of law whose teaching and research focus on constitutional law, executive immunity, and separation of powers principles.[2] Given their areas of expertise, *amici* have an interest in ensuring that questions of immunity are decided in accordance with the text and history of the Constitution, as well as the separation of powers principles that undergird it, and accordingly have an interest in this case.

Amici are:

- **Frank O. Bowman, III**, Floyd R. Gibson Missouri Endowed Professor Emeritus of Law, University of Missouri School of Law
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[1] Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Over two centuries ago, in *Marbury v. Madison*, Chief Justice Marshall observed that not every constitutional question of deep political and legal importance is of "an intricacy proportioned to its interest." *Marbury v. Madison*, 5 U.S. 137, 176 (1803). In other words, sometimes even the most fundamental questions of constitutional interpretation can yield a straightforward answer. This is one such case.

Former President Donald Trump has been charged with using force and deceit to overturn the results of a valid election in violation of 18 U.S.C. § 371. Appl. App. 4a; *see id.* (also noting alleged violations of 18 U.S.C. § 1512(k), § 1512(c)(2), and § 241).

In response, Trump argues that he enjoys absolute immunity from criminal prosecution for actions committed during his tenure as president, and that his acquittal at an impeachment trial bars his subsequent prosecution. Both arguments reflect a misreading of constitutional text and history as well as this Court's precedent. The court below was right to reject them.

As an initial matter, Trump's argument that former presidents are forever immune from criminal prosecution for actions taken while in office finds no support in the Constitution's text and history. Unlike the clear textual immunity granted to legislators under the Speech or Debate Clause, *see* U.S. Const. art.

I, § 6, cl. 1, the Constitution does not explicitly provide immunity to sitting or former presidents. Seeking to distinguish the president from a British King, the Constitution's framers and ratifiers repeatedly indicated that a president "may be indicted and punished" after "commit[ting] crimes against the state." 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 48 (Jonathan Elliot ed., 1836) (Samuel Johnston) [hereinafter *Elliot's Debates*].

To be sure, this Court has held, relying largely on implicit separation of powers principles, that a president enjoys absolute immunity "from damages liability for acts within the 'outer perimeter' of his official responsibility." *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982). But this Court explicitly "limited" its conclusion in *Fitzgerald* to "civil damages claims." *Id.* at 759 (Burger, C.J., concurring). And the separation of powers and public policy considerations underlying that decision make clear that there is no basis for immunity of a former president from criminal prosecution—a very different context from the one this Court encountered in *Fitzgerald*.

Finally, Trump's argument that the Impeachment Judgment Clause, U.S. Const. art. I, § 3, cl. 7, bars his prosecution is at odds with its text and misreads its history. In prescribing that a "Party convicted" is subject to indictment, *id.*, the Clause does not silently prohibit indictment of a party acquitted in impeachment proceedings. Instead, the Clause makes clear that while the only penalty that the Senate can impose following impeachment is removal from office, a "Party convicted" may still be subject to additional punishment through the nation's criminal system. The framers viewed the impeachment process as entirely distinct from criminal prosecution and thus thought that a verdict against an officer in one proceeding should have no impact on the other.

"Our President is not a King," 2 *Elliot's Debates* 200 (Richard Law), and neither is a former president. Because there is no basis in constitutional text or history for Trump's immunity claim, this Court should deny his application to stay the mandate.

ARGUMENT

I. Former President Trump Is Not Immune from Federal Prosecution.

A. As an initial matter, there is no textual basis for the former president's claim of immunity from criminal prosecution.

Even though some state constitutions at the time of the Framing specifically provided "express criminal immunities" to sitting governors, *see* Saikrishna Bangalore Prakash, *Prosecuting and Punishing Our Presidents*, 100 Tex. L. Rev. 55, 69 (2021); *see, e.g.,* Del. Const. of 1776, art. XXIII (providing for the imposition of criminal penalties via impeachment and making the governor "impeachable" "when he is out of office"); Va. Const. of 1776, art. XVI (same), the Constitution contains no explicit grant of immunity to sitting or former presidents. Indeed, the framers themselves expressly specified in the Constitution that legislators would be "privileged from Arrest during their Attendance at the Session of their respective Houses," and would "not be questioned" for "any Speech or Debate in either House," U.S. Const. art. I, § 6, and yet provided no immunity from prosecution or privilege from arrest to presidents.

In other words, the framers "certainly knew how to draft immunity language." Memorandum from Ronald Rotunda to Kenneth Starr re: Indictability of the President 18 (May 13, 1998). If they "wanted to create some constitutional privilege to shield the President . . . from criminal indictment," they could have done so. *Id.*; *see* Appl. App. 43a ("The Framers knew how to explicitly grant criminal immunity in the Constitution, as they did to legislators in the Speech or Debate Clause."). They did not.

B. Former President Trump's claim of absolute immunity from criminal prosecution is at odds with constitutional history as well.

Although there was little discussion of presidential immunity at the Constitutional Convention, what discussion there was provides no support for Trump's argument that this Court should recognize an immunity from criminal prosecution that is not found in the Constitution's text. In September of 1787, James Madison—aware that Virginia's Constitution had "some executive immunities related to the criminal process," *see* Prakash, *supra*, at 71—proposed that the Constitutional Convention "consider[] what privileges ought to be allowed to the Executive." 2 *The Records of the Federal Convention of 1787*, at 503 (Max Farrand ed., 1911) [hereinafter *Farrand's Records*]. Madison's invitation to draft explicit presidential immunity provisions into the nation's founding document was met with silence: the members of the Convention adjourned without addressing his request. *Id.* at 502-03.

According to Charles Pinckney, another delegate, the framers ignored Madison's suggestion because they wanted to limit presidential immunity. As Pinckney recalled during an 1800 Senate debate, "it was the design of the Constitution, and . . . not only its spirit, but letter . . . that it never was intended to give Congress, or either branch, any but specified, and those very limited, privileges indeed." 3 *Farrand's Records* 384-85.

Indeed, during the ratification debates, some participants stressed the executive's liability to criminal prosecution. At his state ratification convention, James Iredell explicitly noted that the president, like anyone else, was "punishable by the laws of his country." 4 *Elliot's Debates* 108-10 (James Iredell); *see id.* (adding that the president "in capital cases may be deprived of his life"); *see* Pauline Maier, *Ratification: The People Debate the Constitutio*n, 1787-1788, at 416 (2010) (noting that Iredell's remarks "remain among the best glosses on the Constitution"); *see also* Answers to Mr. Mason's Objections to the New Constitution recommended by the late Convention of Philadelphia, *in* Griffith John McRee, 2 *Life and Correspondence of James Iredell* 186, 200 (1858) (the president "is not exempt from a trial, if he should be guilty or supposed guilty, of [treason] or any other offence"). Others underscored that the president could be "tried for his crimes," *see Publicola: An Address to the Freemen of North Carolina*, State Gazette of N.C. (Mar. 27, 1788), *reprinted in* 30 *The Documentary History of Ratification Digital Edition* 113, 116 (Kaminski et al. eds., 2009) [hereinafter *Documentary History of Ratification*], and was "liable . . . to be indicted if the case should require it," *see A Freeholder*, Va. Indep. Chron. (Apr. 9, 1788), *reprinted in* 9 *Documentary History of Ratification* 719, 723; *see also* 4 *Elliot's Debates* 48 (Samuel Johnston) ("If he commits crimes against the state, he may be indicted and punished."); *see generally* 3 *Elliot's Debates* 59-60 (Patrick Henry) (noting in opposition to the president's control over the army in the draft Constitution that a president who committed a crime might try to use the army to avoid "being ignominiously tried and punished").

These observations were consistent with the view, reflected in comments by many of the Constitution's "warmest advocates" during the ratification debates, that the Constitution would ensure that the president was accountable to law. *See* Prakash, *supra*, at 72. As James Wilson told the Pennsylvania ratifying convention, the president was "far from being above the laws," and "not a single privilege [wa]s annexed to his character." 2 *Elliot's Debates* 480. In a September 1787 essay, Tench Coxe likewise emphasized that the president could be "proceeded against like any other man in the ordinary course of law." *An American Citizen I*, Indep. Gazetteer (Philadelphia, Pa.) (Sept. 26, 1787), *reprinted in* 2 *Documentary History of Ratification* 138, 141. Many of these advocates made clear that the president's accountability to prosecution would distinguish American leaders from European monarchs. As "Americanus," a supporter of the Constitution from New Jersey, observed, the British king was "above the reach of all Courts of law," but this "prerogative[]" was not "vested in the President." *Americanus II*, N.Y. Daily Advertiser (Nov. 23, 1787), *reprinted in* 19 *Documentary History of Ratification* 287, 288-89.

And throughout the nation's history, presidents and vice presidents have viewed themselves as susceptible to criminal prosecution, at least after they left office. Only a few years after the Constitution's ratification, Aaron Burr, who was then vice president, was indicted for murder in two states after fatally shooting Alexander Hamilton in an 1804 duel. Herbert Parmet & Marie Hecht, *Aaron Burr: Portrait of an Ambitious Man* 218, 223 (1967). Neither Burr nor his defenders suggested that he had any immunity from prosecution for these charges. *Id.* at 231 (indicating that Burr did not oppose the indictments on legal grounds and rather "thought it best not to visit New York or New Jersey"); *see also* Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity at 10, *In re Proceedings of the Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew, Vice President of the United States*, No. 73 Civ. 965 (D. Md. Oct. 5, 1973) [hereinafter *Bork Memo*] (noting that "neither Burr nor his contemporaries considered him constitutionally immune from indictment").

In 1974, then-President Gerald Ford pardoned former President Nixon, seemingly acknowledging his "liab[ility] to possible indictment and trial for offenses against the United States." Proclamation No. 4311, 88 Stat. 2502 (1974). And in 2001, then-President Bill Clinton reached a deal with independent counsel Robert Ray ensuring that he would "avoid indictment for his misleading statements about Monica S. Lewinsky." John F. Harris & Bill Miller, *In a Deal, Clinton Avoids Indictment*, Wash. Post (Jan. 20, 2001); *cf.* Appl. App. 33a-34a (citing statements of counsel during 2021 impeachment proceedings against Trump that reflect the presumption that Trump would not be immune from prosecution after leaving office).

C. To the extent that there exists any Founding-era evidence supporting presidential immunity, this evidence—which this Court has previously considered and described as "fragmentary," *Fitzgerald*, 457 U.S. at 750 n.31—is focused exclusively on the immunity of *sitting* presidents. None of it supports Trump's broad argument that a president remains forever immune from criminal liability even after leaving office.

In the years after the Constitution's Framing, several legislators indicated support for presidential immunities, *see id.* (quoting statements from Senators Ellsworth and Adams), but their brief statements on the matter explicitly focused on immunity of *sitting* presidents. For example, as this Court has previously noted, Oliver Ellsworth and John Adams opined in a congressional debate that a sitting president could not be liable to prosecution, because although legislators could "impeach him," to subject the president to criminal process would "put it in the power of a common justice to exercise any authority over him, and stop the whole machine of government." William Maclay, *Sketches of Debate in the First Senate of the United States* 151-52 (George Harris ed., 1880). Of course, prosecuting a *former* president has no impact on the "whole machine of government." *Id.*

Similarly, Thomas Jefferson's passing references to presidential immunity also focused on concerns that apply only to sitting presidents. *See* Letter of Thomas Jefferson to George Hay (June 20, 1807), *available at* https://www.loc.gov/item/mtjbib017294/ (objecting to compliance with a subpoena because a president should be focused on "public business" and should not be "constantly trudging from North to South & East to West, and withdraw[n . . .] entirely from his constitutional duties"); *cf.* John C. Yoo, *The First Claim: The Burr Trial,* United States v. Nixon*, and Presidential Power*, 83 Minn. L. Rev. 1435, 1465 (1999) (noting that "any objections Jefferson did have to the subpoena were grounded not on constitutionality, but on convenience"). When an individual is no longer president, prosecution does not tear him away from "public business," Jefferson, *supra*, and would no longer pose the concerns Jefferson raised.

D. Finally, the scholarly consensus is at odds with Trump's position. Even some constitutional scholars who support presidential immunity from prosecution for sitting presidents recognize that it should not exist after a president leaves office. *See* Brian C. Kalt, *Criminal Immunity and Schrödinger's President: A Response to* Prosecuting and Punishing Our Presidents, 100 Texas L. Rev. Online 79, 83 (2021) ("[B]oth sides in the immunity debate agree that presidents are unregally subject to criminal prosecution. The question is simply one of timing."); Akhil R. Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, Nexus (Spring 1997) ("[T]he privilege we assert says that, if the President does it, he can be held responsible for it after he leaves office." (footnote and quotation marks omitted)); Charles L. Black, Jr. & Philip Bobbitt, *Impeachment: A Handbook* 37 (2018) (arguing that "the simple and obvious solution" to the liability of a sitting president would be to delay trial or indictment until after his term has expired); W. Burlette Carter, *Can a Sitting President Be Federally Prosecuted? The Founders' Answer*, 62 Howard L.J. 331, 344 (2019) (arguing that a sitting president cannot face prosecution that "would result in removal of the President," because the Founders would have seen this as an imposition on impeachment jurisdiction). Likewise, the executive branch has consistently noted that a president's immunity from criminal prosecution—if it exists at all—exists only for a president "still in office." *See Bork Memo* 16 ("The Framers could not have contemplated prosecution of an *incumbent* President . . . ." (emphasis added)); *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222, 255 (Oct. 16, 2000) ("[r]ecognizing an immunity from prosecution for a sitting President would not preclude such prosecution once the President's term is over or he is otherwise removed from office by resignation or impeachment"); Assistant Attorney General Robert G. Dixon, Jr., *Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office* 32, n.25 (Sept. 24, 1973) (unpublished memo), *available at* https://irp.fas.org/agency/doj/olc/092473.pdf?ref=americanpurpose.com (suggesting that a sitting president cannot be indicted, but recommending that Congress pass a statute tolling the running of criminal statutes of limitations for crimes presidents commit while in office in order to preserve the prospect of prosecuting a former president).

In short, Trump's plea for absolute immunity finds no support in the Constitution's text and history. Nor does it find support in this Court's precedent, as the next Section discusses.

II. This Court's Precedent Does Not Support Trump's Claim of Absolute Immunity from Criminal Prosecution.

Former President Trump argues that the decision of the court below is at odds with this Court's decision in *Nixon v. Fitzgerald*. Appl. 11. This is wrong.

In *Fitzgerald*, this Court recognized the president's "absolute . . . immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." 457 U.S. at 756. This Court did not consider—let alone decide—whether a former president is immune from criminal prosecution.

And significantly, the rationales this Court relied upon in *Fitzgerald* do not support absolute immunity from criminal prosecution for former presidents. According to the *Fitzgerald* Court, "[b]ecause the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure," including our system of "separation of powers" and "concerns of public policy." *Id.* at 747-48; *see id.* at 760 (Burger, C.J., concurring) (the immunity recognized in *Fitzgerald* "is either to be found in the constitutional separation of powers or it does not exist").

As the *Fitzgerald* Court further explained, immunity is "not for the protection or benefit of a malicious or corrupt [official], but for the benefit of the public, whose interest it is that the [officials] should be at liberty to exercise their functions with independence and without fear of consequences." *Id.* at 745-46; *see Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982) ("an executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station"). A president, as the nation's "Chief Executive," *Fitzgerald*, 457 U.S. at 760, must be able to make the decisions specifically entrusted to him without worrying about private suits challenging his official conduct.

Given the rationales underlying immunity, not every exercise of jurisdiction over the president is barred by his or her constitutional status. Rather, "[w]hen judicial action is needed to serve broad public interests—as when the Court acts . . . to vindicate the public interest in an ongoing criminal prosecution," immunity is inappropriate. *Id.* at 754. That is why *Fitzgerald* distinguished a president's civil damages liability from instances in which a president faces criminal prosecution, where the "interest to be served" by exposing the president to liability would be much greater. *See id.* at n.37 (noting that "[t]he Court has recognized before that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions"); *see also Clinton v. Jones*, 520 U.S. 681, 704 n.39 (1997) (describing "the powerful interest in the 'fair administration of criminal justice'" (quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974))); *cf. Trump v. Vance*, 140 S. Ct. 2412, 2431 (2020) ("Two hundred years ago, a great jurist of our

Court established that no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding. We reaffirm that principle today . . . .").

Making a former president liable to federal prosecution does not represent the same threat to the independence of the executive branch as the prospect of unlimited liability for civil damages. After all, the "procedural guarantees normally associated with criminal prosecutions," *United States v. Ward*, 448 U.S. 242, 253 (1980), limit the possibility of harassment by criminal indictment. "[G]rand juries are prohibited from engaging in 'arbitrary fishing expeditions' and initiating investigations 'out of malice or an intent to harass,'" and "federal courts have the tools to deter and, where necessary, dismiss" improper indictments against former presidents, *Vance*, 140 S. Ct. at 2428 (quoting *United States v. R. Enters., Inc.*, 498 U.S. 292, 299 (1991)); Appl. App. 35a (describing "safeguards in place to prevent baseless indictments"). Moreover, while many actions a president might in good faith take in the exercise of his official duties could create the risk of civil litigation, far fewer, if any, will raise the risk of criminal prosecution. Given these differences between civil litigation and federal criminal prosecution, liability to criminal prosecution is much less likely to affect a president's ability to "deal fearlessly and impartially with the duties of his office," *Fitzgerald*, 457 U.S. at 751-52, than liability to countless civil suits.

In short, the presidential immunity doctrine is designed to prevent the judicial branch from undermining the president's capacity to discharge fully and fearlessly his constitutionally assigned roles. It would be entirely improper to apply that doctrine to allow a former president to escape federal criminal prosecution—especially prosecution for crimes involving the use of violence and deception to undermine the results of a valid election and incapacitate Congress in the discharge of its constitutional obligations. *See* Appl. App. 38a-39a (describing the strong public interest in "the foundational principle of our government that the will of the people, as expressed in the Electoral College vote, determines who will serve as President"). Such an application would be a perversion of the separation of powers and a threat to the rule of law.

III. The Impeachment Judgment Clause Does Not Bar Prosecution of a Former President, Even Following Acquittal in Impeachment Proceedings.

Former President Trump also argues that this prosecution is barred by the Impeachment Judgment Clause because he was impeached and acquitted by the Senate for "closely related conduct." *See* Appl. 9 (citing U.S. Const. art. I, § 3). Even if the conduct charged here were sufficiently related to the conduct at issue in Trump's impeachment, this argument is based on a misreading of the Impeachment Judgment Clause and fares no better than Trump's other arguments for immunity.

A. To start, Trump's argument has no basis in the text and history of the Constitution. The Impeachment Judgment Clause states that "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification . . . 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. The Clause says nothing about the prosecution of an officer who was acquitted after an impeachment proceeding and instead merely confirms that an officer who was convicted via impeachment may face subsequent prosecution. *See* Rotunda, *supra*, at 19 ("The clause does not state that criminal prosecution must come after an impeachment, nor does it state that the refusal of the House to impeach (or the Senate to remove from office) would bar a subsequent criminal prosecution.").

Significantly, the Clause first states that "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification," limiting the type of punishment that lawmakers can impose on an impeached officer. This was an important distinction from British practice: in addition to removal from office, impeachments in eighteenth-century Britain could "trigger the most severe, even brutal, punishments known to the law." Frank O. Bowman III, *High Crimes and Misdemeanors: A History of Impeachment for the Age of Trump* 93 (2019); Carter, *supra*, at 353. The second sentence thus made clear that officers impeached and convicted could still face "further punishments" in court, despite the restriction of punishments available after Senate conviction. *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, 126 (Aug. 18, 2000) [hereinafter *Former President Memo*]. "[T]he punishment which may be the consequence of conviction upon impeachment," in other words, would not "terminate the chastisement" of an offending officer. *The Federalist No. 65*, at 398-99 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

That the framers would have wanted to make clear that an individual convicted after impeachment could also face criminal penalties is unsurprising: they "did not regard impeachment and the criminal law as serving the same ends." Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* 88 (2000). As Governor Johnston told the North Carolina ratifying convention, impeachment is "a mode of trial pointed out for great misdemeanors against the public," distinct from the process in which officers are indicted for "commit[ting] crimes against the state." 4 *Elliot's Debates* 48; *see* Lectures on Law, *in* 1 *The Works of James Wilson* 324 (Robert Green McCloskey ed., 1967) ("Impeachments, and offences and offenders impeachable, come not . . . within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims, and are directed to different objects."); *The Federalist No. 65*, *supra*, at 396 (impeachable offenses are "with peculiar propriety . . . political, as they relate chiefly to injuries done immediately to the society itself"); *see generally* Raoul Berger, *Impeachment: The Constitutional Problems* 84 (1973); *Bork Memo* 7 ("[i]n truth, impeachment and the criminal process serve different ends so that the outcome of one has no legal effect upon the outcome of the other"); *id.* at 8 ("neither conviction nor acquittal in one trial, though it may be persuasive, need automatically determine the result in the other trial").

B. Former President Trump argues that the Clause's reference to a "Party convicted" means that only officials who have been convicted following impeachment can be subject to criminal liability. Appl. 9; *see id.* at 20 ("the Impeachment Judgment Clause specifically *authorizes* the criminal prosecution of a President, but only after the crucial structural check of impeachment and conviction"). In his view, "principles of double jeopardy" also foreclose prosecution in this case. *Id.* at 32. This is wrong.

As noted earlier, the Founders did not understand impeachment and the criminal law to serve the same ends. They saw impeachment as "a proceeding purely of a political nature," 2 Joseph Story, *Commentaries on the Constitution of the United States* 272 (1833), completely unrelated to "ordinary jurisprudence," *see* Lectures on Law, *supra*, at 324; Gerhardt, *supra*, at 89 (describing the "framers' view of impeachment and criminal proceedings as separate actions unfolding in no particular sequence"). Thus, they did not make an officer's liability to prosecution contingent on the results of an impeachment proceeding.

Nor did they view impeachment as a process that triggered double jeopardy concerns. By restricting the sanctions available in impeachment proceedings, the framers made clear that the Senate could not impose the "normal criminal punishments that were necessary to place someone in jeopardy," making any double-jeopardy protections inapplicable. *Former President Memo*, 24 Op. O.L.C. at 128; Carter, *supra*, at 365 n.159 (noting that the Founders addressed any "double jeopardy difficulty" by limiting the judgment in impeachment cases to removal from office, because double jeopardy applied only to punishments impacting "life or limb").

Trump argued below that the second component of the Clause—the proviso that a "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—would be unnecessary if not to clarify that double jeopardy principles apply to acquittals. Appl. App. 50a-51a. But he offers no support for the view that the proviso serves this purpose, rather than merely emphasizing that the full range of punishments would be available to a criminal court so that "high officials would be fully punished for their misdeeds." *Former President Memo*, 24 Op.

O.L.C. at 127.

Notably, Edmund Pendleton, president of the Virginia Ratifying Convention, explicitly rejected the view that the Impeachment Judgment Clause would prevent prosecution of an officer in the case of acquittal by impeachment. He noted upon reviewing the Constitution that the House of Representatives could, in the face of "obstruction" from the Senate, "resort to the courts of Justice, as an acquittal would not bar that remedy." Letter from Edmund Pendleton to James Madison (Oct. 8, 1787), *in The Boisterous Sea of Liberty: A Documentary History of America from Discovery Through the Civil War* 248 (David Brion Davis & Steven Mintz eds., 1998).

Justice Story agreed that officers subject to impeachment could be prosecuted after an acquittal. He viewed the Clause as ensuring that "the common tribunals of justice should be at liberty to entertain jurisdiction of the offence, for the purpose of inflicting the common punishment," and emphasized that a "second trial for the same offence could be had, either after an acquittal or a conviction in the court of impeachments." 2 Story, *supra*, at 250-51; Steven Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 Ky. L.J. 643, 669-70 (1987) ("It is inconceivable to me, as it was to Justice Story, that the framers intended to bar the prosecution of one impeached but not convicted . . . .").[3]

[3] Congressional practice also belies the suggestion that double jeopardy principles apply to impeachment. Congress has impeached individuals who have already been the subject of criminal prosecution—a practice that would violate the Double Jeopardy Clause if impeachment triggered double jeopardy principles. H. Res. 87, 101st Cong., 2d Sess. (1989) (impeaching Walter L.

Moreover, the court below was right to emphasize the "implausibility" of any reading of the Clause that would "prohibit the Executive Branch from prosecuting current and former civil officers for crimes committed while in office, unless the Congress first impeached and convicted them." Appl. App. 48a.

As an initial matter, many of the Constitution's framers and ratifiers assumed that officers could be subject to prosecution—regardless of whether they had been impeached. For example, James Iredell opined that officers could be "tried by a court of common law . . . for common-law offenses, *whether impeached or not*." 4 *Elliot's Debates* 36-37 (James Iredell) (emphasis added). During ratification debates in North Carolina, James Iredell addressed Joseph Taylor's concern that impeachment would be impractical for citizens seeking "redress" against malfeasant federal officers by noting that Taylor would have a point "if there were no other mode of punishing," but that an officer could always be tried at common law. *Id.* Archibald Maclaine agreed, reassuring Taylor that officers could be "tried and indicted" in common law courts, "[n]otwithstanding the mode pointed out for impeaching and trying." *Id.* at 45; *id.* (adding that "no offender can escape the danger of punishment").

Furthermore, the "indictment of sitting judges was accepted as proper both before the adoption of the Constitution and in the decades following its

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Nixon, Jr., Judge of the United States District Court for the Southern District of Mississippi, for high crimes and misdemeanors after he was previously prosecuted and convicted); H. Res. 499, 100th Cong., 2d Sess. (1988) (impeaching Alcee L. Hastings, Judge of the United States District Court for the Southern District of Florida, for high crimes and misdemeanors after he was previously prosecuted and acquitted).

ratification," *see* Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 Hastings Con. L.Q. 7, 25-26 (1992) (describing proceedings against judges in Virginia, Pennsylvania, and eighteenth-century England); Burbank, *supra*, at 672 ("criminal proceedings were not a threat to judicial independence unknown to the framers"), even when those judges were not first convicted via impeachment. For example, in 1796, Attorney General Charles Lee, opining on the "oppressions" caused by Judge George Turner of the Northwest Territory, told members of the House of Representatives that federal judges "may be prosecuted . . . by indictment before an ordinary court, or by impeachment before the Senate of the United States," and recommended that Judge Turner be indicted rather than impeached, given the "difficulty" and "expense" posed by bringing witnesses to the Senate. *See* Letter of May 9, 1796, *in* 1 *American State Papers (Misc.)* 151.

In the years that followed, prosecutors have continued to levy charges against sitting judges even though they have not been convicted via impeachment. *See* Berger, *supra*, at 317 n.9 (noting the opinion of then-Assistant Attorney General William Rehnquist regarding the prosecution of Abe Fortas); *see generally* Gerhardt, *supra*, at 87-91; *United States v. Claiborne*, 727 F.2d 842, 846 (9th Cir. 1984) (rejecting Judge Claiborne's argument for immunity based on Impeachment Judgment Clause and collecting cases). And courts have also permitted the indictment of federal officers even though they were not first impeached. *See, e.g.*, Anthony Ripley, *Kleindienst Admits Misdemeanor Guilt*, N.Y. Times, May 17, 1974, at 1, 24, https://www.nytimes.com/1974/05/17/archives/kleindienst-admits-misdemeanor-guilt-accused-ofkeeping-data-from.html (describing indictment of former Attorney General for allegations involving his tenure as Deputy Attorney General, and noting indictments of former officers Harry M. Daugherty and John N. Mitchell for actions taken in office); Appl. App. 49a n.12 ("history reveals examples of prosecutions preceding impeachment").

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As the framers and ratifiers of our Constitution recognized, no man is "above the laws," *Clinton*, 520 U.S. at 696 (quoting James Wilson), nor "better than his fellow-citizens," 4 *Elliot's Debates* 109 (James Iredell). Even the president, therefore, is "punishable by the laws of his country." *Id.* This Court should reject the former president's arguments to the contrary.

CONCLUSION

For the foregoing reasons, this Court should deny the application for a stay.

Respectfully submitted,

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