No. 23-939

# In The Supreme Court of the United States

DONALD J. TRUMP,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## BRIEF OF *AMICI CURIAE* SENATOR STEVE DAINES AND THE NATIONAL REPUBLICAN SENATORIAL COMMITTEE IN SUPPORT OF PETITIONER


JONATHAN P. LIENHARD
*Counsel of Record*
ANDREW B. PARDUE
ANDREW D. WATKINS
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
15405 John Marshall Hwy.
Haymarket, VA 20169
(540) 341-8808 (telephone)
(540) 341-8809 (facsimile)
jlienhard@holtzmanvogel.com

JESSICA FURST JOHNSON
JONATHAN FAHEY
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
2300 N Street NW, Ste. 643
Washington, DC 20037
(202) 737-8808 (telephone)
(540) 341-8809 (facsimile)

*Counsel for Amici Curiae*



LANTAGNE LEGAL PRINTING
1108 East Main Street Suite 1201 Richmond Virginia 23219 (800) 847-0477

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Constitution**



**Statutes**



**Other Authorities**

## INTERESTS OF THE *AMICI CURIAE*[1]

*Amicus curiae* Senator Steve Daines is a member of the Republican Party and represents the people of Montana in the U. S. Senate. Senator Daines currently serves as the Chairman of the National Republican Senatorial Committee (NRSC). *Amicus curiae* NRSC is a registered "national committee" of the Republican Party, as defined by 52 U. S. C. § 30101(14), and the Republican Party's senatorial campaign committee. Its membership includes all incumbent Republican Members of the United States Senate.

Chairman Daines and NRSC seek to defend the separation of powers enshrined in the U. S. Constitution and the prerogatives of the U. S. Congress to review and punish alleged presidential misconduct. *Amici* also have a unique and profound interest in preserving their own legislative privilege which protects them from criminal prosecution for their official acts, and are concerned that the abrogation of executive immunity in this case could have adverse consequences for the other branches of the federal government.

---

[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *Amici Curiae*, their members, and their counsel made any monetary contribution toward the preparation or submission of this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In a post-presidential interview, former President Nixon famously declared that "when the President does it . . . that means that it is not illegal."[2] The D.C. Circuit's decision can be summarized differently: "If President Trump did it, it probably *is* illegal and should be prosecuted as such."

This inverts the standard approach to immunity questions: Generally, a court determines what legal protections a given defendant should receive without first asking how guilty it thinks they are. However, the D.C. Circuit entirely misses the point and begins its decision by implying that it is fundamentally unfair that "hundreds of people" have been criminally convicted for their actions on January 6, 2021, when former President Trump has not, and then proceeds to cherry-pick the applicable caselaw to arrive at an outcome that will allow the prosecution of Trump to proceed.

Perplexingly for a matter involving a criminal prosecution, the D.C. Circuit relies primarily on *civil* cases for support, even though the cases cited either (1) do not implicate criminal liability, (2) do not involve a President as defendant, or (3) both. In one particularly

---

[2] Teaching American History, *Transcript of David Frost's Interview with Richard Nixon* at 2 (1977), https://www.congress.gov/116/meeting/house/110331/documents/HMKP-116-JU00-20191211-SD408.pdf.

egregious oversight, the Court cites a civil case in which immunity from suit was abrogated for a Cabinet officer in a legal challenge to his official conduct in office while ignoring a subsequent case in which the Supreme Court overturned the same man's criminal sentence arising out of the same events after determining that immunity applied. These are the kinds of legal errors that would make a first-year law student blush.

Making matters worse, the consequences of the panel opinion will not be as limited as the D.C. Circuit thinks. The panel assures readers that its holding will not set the country on a slippery slope towards the complete criminalization of political differences because Trump is the first former President to be prosecuted but fails to consider the obvious response: No prosecutor has ever tried this type of case before because no court has previously said that they could, and prosecutors typically exercise restraint in uncharted waters. The D.C. Circuit opinion is akin to a loaded gun lying on the table that future prosecutors can now wield against Presidents (and former Presidents) of all political persuasions. The D.C. Circuit seems to believe that partisan actors will be able to resist the temptation to use that weapon against their political enemies; anyone who pays the slightest attention to American politics knows better.

In short, the D.C. Circuit misapplied the relevant law and miscalculated the inevitable impact of its decision. While federal courts have traditionally

treated Presidents as having greater protections from suit than lower-ranking federal officials, the D.C. Circuit has instead carved Donald Trump out from the pantheon of American Presidents by awarding him *fewer* protections. That decision is legally flawed, but its manifest errors will be ignored by future litigants with an ax to grind. As with all legal precedents, the Court's reasoning is not limited to the facts of one case but will pose a continuing problem for future Presidents that will constrain executive freedom of action and paralyze the criminal justice system. For these reasons, the decision should be reversed.

## I. THE D.C. CIRCUIT ERRED BY CONFLATING CIVIL AND CRIMINAL LAW.

Although there are multiple legal errors in the D.C. Circuit's opinion, this brief will focus on the most serious. The panel erred in relying primarily on civil litigation precedents in its decision obviating presidential immunity from criminal suit, while ignoring important distinctions between civil and criminal law that point toward a different conclusion in which immunity from criminal prosecution should be more robust.

### A. The D.C. Circuit Relied Primarily on Civil Precedents that are Inapplicable to the Question Presented.

The opinion below cites frequently to the foundational Supreme Court precedent of *Marbury* v. *Madison*, arguing that *Marbury* "makes clear that

Article III courts may review certain kinds of official acts—including those that are legal in nature." *United States* v. *Trump*, 91 F.4th 1173, 1190 (D.C. Cir. 2024). This observation is simultaneously correct and irrelevant. The power of a federal court to *review* and—if necessary—enjoin unlawful presidential action does not imply that courts possess the very different power to impose criminal liability for the same. Moreover, it is unclear what *Marbury* could possibly have to say about presidential immunity from criminal liability when that case involved neither a criminal matter nor a President.

*Marbury* involved the appointment of William Marbury as a justice of the peace by outgoing President John Adams, and the subsequent failure of incoming Secretary of State James Madison to deliver the new appointee's signed and sealed commission. 5 U. S. (1 Cranch) 137, 155 (1803). Marbury filed a petition for a writ of mandamus seeking to have a federal court compel Secretary Madison to perform his ministerial duty to deliver the commission (a duty indisputably within the scope of the Secretary's official responsibilities). *Id.*, at 153–54. Although the Court agreed that Marbury was legally entitled to the writ of mandamus he sought, *see id.*, at 169–73, the Supreme Court ultimately concluded that it lacked the power to issue the writ in that case for constitutional reasons implicating the Court's original jurisdiction. *Id.*, at 173–80.

And yet, from a decision involving the Secretary of State in which the criminal liability of the challenged federal officer was neither alleged nor adjudicated, the D.C. Circuit has somehow discerned a standard authorizing it to abrogate presidential immunity from criminal prosecution. The panel quotes *Marbury* as saying "[i]t is not consistent with the policy of our political institutions . . . that any ministerial officer having public duties to perform[] should be above the compulsion of law in the exercise of those duties," 91 F.4th at 1190 (quoting 5 U. S., at 149–50), but legal *compulsion* and legal *punishment* are very different animals. It is particularly strange that the panel would refashion a precedent that *affirmed* presidential authority in the face of non-compliance by a subordinate federal officer to circumscribe presidential power here.

The strange choices of the D.C. Circuit do not end with *Marbury*. In a case involving the criminal prosecution of a former President, the precedents upon which the D.C. Circuit relies almost uniformly involve *civil* lawsuits filed against federal officers (and often, lawsuits filed against defendants who were not the President). *See, e.g.*, *Little* v. *Barreme,* 6 U. S. 170, 176 (1804) (civil lawsuit seeking permanent injunction and money damages); *Kendall* v. *United States ex rel. Stokes,* 37 U. S. 524, 610–12 (1838) ("*Kendall I*") (petition for writ of mandamus seeking court order compelling payment of award by the incumbent Postmaster General); *Mississippi* v. *Johnson*, 71 U. S.

475, 497 (1867) (civil lawsuit against incumbent President requesting permanent injunction restraining the enforcement of certain federal statutes); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 583–84 (1952) (civil lawsuit against Secretary of Commerce seeking declaratory judgment and permanent injunction); *Clinton* v. *Jones*, 520 U. S. 681, 684 (1997) (civil lawsuit against incumbent President seeking money damages for pre-presidential private conduct).

The D.C. Circuit does cite to criminal cases involving *other* governmental defendants: namely, legislators and judges. For *amici*, these analogies are not reassuring.

The danger lies in the D.C. Circuit's holding that a President's official actions that are alleged to "violate[] generally applicable criminal laws" cannot properly lie "within the scope of his lawful discretion." 91 F.4th at 1192. This approach obviates the standard criminal law requirement of *mens rea* or "guilty mind," which is such an important procedural protection that the Supreme Court has even read it into federal criminal statutes that "are silent on the required mental state." *Elonis* v. *United States*, 575 U. S. 723, 736 (2015). It cannot be the case that the mere existence of a broadly worded criminal statute deprives federal officials of all discretion over how to conform their conduct to the requirements of law, because that would convert all federal crimes into strict liability offenses for which it is not necessary to demonstrate the defendant's mental

state to obtain an indictment (or a conviction). If this analysis is a correct reading of the law, then legislators and judges have equal reason for concern.

Fundamentally, "it [i]s not for courts to pass upon . . . abstract, intellectual problems . . . if a concrete, living contest between adversaries" doesn't "call[] for the arbitrariment of law." *Carney* v. *Adams*, 141 S. Ct. 493, 498 (2020) (quoting *Coleman* v. *Miller*, 307 U. S. 433, 460 (1939) (Frankfurter, J., concurring)). To the extent that the D.C. Circuit thinks that any of these precedents answers the question presented in this case, it is wrong.

### B. The D.C. Circuit Ignored the Supreme Court Precedent Most Relevant to the Question Presented.

The D.C. Circuit anticipates and responds to a single objection to its argument-by-analogy. The panel notes that "[o]bjection may be made that *Marbury* and its progeny exercised jurisdiction over subordinate officers, not the President himself," but waves away that issue by citing the general principle that "[n]o man in this country is so high that he is above the law." 91 F.4th at 1191 (quoting *United States* v. *Lee*, 106 U. S. 196, 220 (1882)). While this is certainly one issue, it's not the biggest problem with the panel's argument.

Most egregiously, the D.C. Circuit ignores the precedent that sheds most light on the question presented here. The decision below cites *Kendall I*, 37 U. S., at 609, 626, a case arising out of the Postmaster

General's cancellation of a federal contract for mail transportation in which the parties to the cancelled contract successfully obtained a writ of mandamus compelling the payment of unpaid funds they were owed. The panel argues that this verifies the power of federal courts to review *civil* lawsuits alleging that federal officers violated federal law in the performance of their official duties. 91 F.4th at 1190 (citing 37 U. S., at 612–13). No party to this case disputes that anodyne observation. And yet, the panel curiously omits any reference to the subsequent companion case *Kendall* v. *Stokes*, 44 U. S. 87 (1845) ("*Kendall II*"), which is more relevant to the facts presented here.

In *Kendall II*, the *Kendall I* plaintiffs attempted to hold the *same* (now-former) Postmaster General *personally liable* for the damages they allegedly suffered from his "illegal[] and malicious[]" cancellation of their contract—*the same official act* successfully challenged in the first case. *Id.*, at 94. The trial court agreed that Kendall was personally liable for his official conduct and sentenced him to "a judgment of eleven thousand dollars' damages and confined him to the District of Columbia." A. Schlesinger, Jr., The Age of Jackson 392–93 (Little, Brown & Co. ed. 1945). "[S]entenced to debtors[‘] prison" for his inability to pay the judgment, Kendall was "saved only by . . . a favorable Supreme Court decision on the mail contractors' lawsuits" that reversed the judgment of the trial court. J. Kleber, The Kentucky Encyclopedia 486 (3d ed. 1992); *Kendall II*, 44 U. S., at 103.

Critically, the more serious personal liability implicated in *Kendall II* required a different outcome than *Kendall I*. The *Kendall II* Court held that "[w]e are not aware of any case in England or in this country in which it has been held that a public officer, acting to the best of his judgment and from a sense of duty, . . . has been held liable to an action for an error of judgment"—an error which, incidentally, the Court agreed on the merits that Kendall had made in this case, as evidenced by its holding in *Kendall I*. 44 U. S., at 97–98. Specifically, "a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion." *Id.*, at 98. Although the Court did not use the word "immunity," that is the clear takeaway from the majority opinion. While the *Kendall I* Court agreed it had the power to compel a federal officer to disburse contractual funds, the *Kendall II* Court did not think the judiciary had the power to punish the same man personally for his error, up to and including confining him to debtors' prison.

Even more significant than the majority holding is the fact that the solo dissenting opinion in *Kendall II* sounds suspiciously like the panel's opinion here. The *Kendall II* dissent argues that "[i]t is a fundamental principle in our government, that *no individual*, whether in office or out of office, *is above the law*" and that former federal officials "may be held legally responsible" for their official acts. *Id.*, at 792–93

(McLean, J., dissenting) (emphases added). Armed with this generic accountability principle, the dissent then indicated that the culpability of the defendant was relevant to the question of immunity, stating that while a federal official may be shielded from prosecution for their official acts "if [his power] be exercised in good faith, . . . . He can claim no immunity beyond this." *Id.*, at 792. (McLean, J., dissenting). The D.C. Circuit does not even attempt to explain why it applies the rule of the solo dissenting Justice rather than the *Kendall II* majority.

This is a glaring and inexplicable omission. Two Supreme Court cases involving the same alleged conduct by the same federal officer ending in different holdings, one involving purely civil consequences and one implicating the personal criminal liability of the defendant, offer the perfect guide to demarcating the outer bounds of executive immunity.[3] Nevertheless, the D.C. Circuit ignored the criminal case that is more directly on-point and acted as if the civil precedents it collects are the only ones that exist. Perhaps the panel

---

[3] As an aside, although the former Postmaster General was the sole defendant in these cases, there is some evidence that he acted at presidential direction in cancelling the underlying contract. Days after the Supreme Court's *Kendall II* decision, former President Jackson, the man who appointed Kendall, wrote a letter to Kendall congratulating him on his legal victory, saying: "This [is] only justice to you and your honest endeavors to save the Government from *real plunder*." Letter from Andrew Jackson to Amos Kendall, (Jan 15, 1845), available at: https://garystockbridge617.getarchive.net/amp/media/andrew-jackson-to-amos-kendall-january-15-1845.

had a good explanation for why it thought *Kendall II* was not relevant to the question before it, but if it did then the panel failed to share it.

### C. Historical Practice Indicates that the Power to Review (and Enjoin) Executive Action Does Not Include the Power to Punish.

No one disputes that "when the President takes official action, the Court has the authority to determine whether he has acted within the law." *Clinton*, 520 U. S., at 703. The D.C. Circuit's error is assuming this means anything more than what it says.

When courts review cases involving separation of powers, "the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them." *Youngstown*, 343 U. S., at 610 (Frankfurter, J., concurring). In a case of first impression like this, the long history of enjoining—but not prosecuting—unlawful executive action strongly indicates that the power of judicial review does not encompass the power to impose criminal liability for official acts, even when courts have determined that a President's official acts have violated federal law.

This principle is best illustrated by the most famous Supreme Court precedent concerning separation of

powers: *Youngstown Sheet & Tube Co.* v. *Sawyer*. The D.C. Circuit favorably cites *Youngstown*, claiming that "[t]he Supreme Court exercised its cognizance over Presidential action to dramatic effect in 1952[] when it held that President Harry Truman's executive order seizing control of most of the country's steel mills exceeded his constitutional and statutory authority and was therefore invalid." 91 F.4th at 1190–91 (citing 343 U. S., at 587–89)). Once again, the panel extrapolated from the holding a conclusion that does not clearly follow from the *Youngstown* decision.

First, it's not quite right to say that *Youngstown* involved judicial review "over Presidential action," because the President was not the relevant actor in that case. President Truman "issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills," but the Secretary was the federal officer who implemented the presidential order, as well as the officer who was sued for his compliance therewith. 343 U. S., at 582–83. This is how the executive branch generally works, for what it's worth; the President orders subordinate officers to take particular action, but the President rarely takes such action personally. This is one way the President differs from Congress, where Members "act" through votes on legislation. This also explains the "'apparently unbroken historical tradition . . . implicit in the separation of powers' that a President may not be ordered by the Judiciary to perform particular Executive acts," even if his unlawful orders can

effectively be overridden by a contrary judicial order directed to the responsible subordinate officer. *Clinton*, 520 U. S., at 718–19 (Breyer, J., concurring) (quoting *Franklin* v. *Massachusetts*, 505 U. S. 788, 827 (1992) (Scalia, J., concurring in part)).

But even if federal courts *could* directly enjoin the President as the D.C. Circuit hints, that does not mean he can be held criminally responsible for the enjoined action. To continue with the *Youngstown* example, even though six Justices of the Supreme Court agreed that President Truman's order to seize the steel mills was unlawful, the sole consequence of that holding was an injunction issued by the district court to the Secretary of Commerce instructing him to relinquish possession of the mills. 343 U. S., at 584, 589. No party sought or obtained any criminal punishment for President Truman or the subordinate officers who carried out his unlawful order, and the D.C. Circuit never adequately explains why it believes that such power exists. The panel's chain of logic is missing some essential intermediate steps.

The fact that "the President does not enjoy absolute immunity from criminal subpoenas issued by state and federal prosecutors and may be compelled by the courts to respond" misses the point of the precedents upon which the panel ostensibly relies. 91 F.4th at 1191. *United States* v. *Burr* and *United States* v. *Nixon* each involved subpoenas received by the President arising out of the criminal prosecution of another person. *See* 25 F. Cas. 30, 32–33 (C.C. Va. 1807) (subpoena to

President Jefferson arising out of prosecution of Aaron Burr); 418 U. S. 683, 686 (1974) (subpoena to President Nixon arising out of prosecution of John Mitchell). *Trump* v. *Vance*, which did arise out of a state criminal investigation into an incumbent President, involved a subpoena directed to a third-party seeking business and tax records related to the President's *pre-presidential* conduct (*i.e.*, not his official acts). 140 S. Ct. 2412, 2420 (2020).

It goes without saying that being compelled to respond to criminal process in matters where other people face criminal liability is not equivalent to facing such liability yourself. To take the *Nixon* case as an example, the sole interest asserted by the President in refusing to comply with the subpoena was "a generalized claim of the public interest in the confidentiality of nonmilitary and nondiplomatic discussions." 418 U. S., at 707. That's a far weaker interest than a former President's interest in retaining his liberty, or the interest shared by all Presidents in preserving their freedom of action to enforce federal law according to their best interpretation thereof. *Vance* carries the panel no closer towards its goal because that case involved merely an expansion of the *Clinton* v. *Jones* rule on pre-presidential conduct to the criminal context. 140 S. Ct., at 2426. In sum, the D.C. Circuit drilled the precedential well and came up dry.

The sheer novelty of this case cuts against any abrogation of presidential immunity. It is a bedrock principle of constitutional law that "no man shall be

held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Bouie* v. *City of Columbia*, 378 U. S. 347, 351 (1964). The one proposition with which both parties to this appeal agree is that this case presents a question of first impression for this Court. To pursue criminal liability when there was no prior warning that a President could be criminally prosecuted for his official acts would violate former President Trump's rights to due process under law.

Criminal liability, which carries with it the concomitant power to deprive an individual of their liberty, indisputably carries with it direr consequences than the kinds of civil damages liability from which this Court has already fully shielded former Presidents for their official acts. *See Nixon* v. *Fitzgerald*, 457 U. S. 731, 757 (1982). Nevertheless, the D.C. Circuit has now shielded Presidents from the lesser danger while exposing them to the greater. Courts should proceed carefully before waving away immunity in the criminal realm, because while it is true that "[n]o man in this country is so high that he is above the law," 91 F.4th at 1191 (quoting *Lee*, 106 U. S., at 220), it is also true that no man in this country ought to be carelessly stripped of the constitutional protections guaranteed to him as an American citizen and an American President simply because a federal court thinks he ought to be punished.

## II. ABROGATING CRIMINAL IMMUNITY FOR OFFICIAL ACTS WILL CHILL FUTURE EXECUTIVE ACTION.

The potential conviction of one former President is a weighty matter in and of itself, but the lower court's opinion will foment harms even broader than the personalized injury suffered by a single individual. The Supreme Court has previously recognized a former President's immunity from civil liability for official acts due to his "unique status under the Constitution" and "the singular importance of the President's duties." *Fitzgerald*, 457 U. S., at 750–51. The same interests, as well as the perverse incentives created by the D.C. Circuit opinion, counsel in favor of applying a similar rule in the criminal context.

### A. The President is Different from Other Federal Officers in Ways that Deserve Heightened Protection.

The President fulfills a different and distinct role in our constitutional firmament than do executive branch officers who are appointed by the President. The executive power is vested by the Constitution *only* in the President, and presidential appointees exercise only a portion of that power at the President's forbearance. U. S. Const. Art. II, § 1, cl. 1; *but see Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935) (holding that Congress may restrict the President's removal power in certain cases). It is the President's lone constitutional duty to "take care that

the Laws be faithfully executed," U. S. Const. Art. II, § 3; everyone else in the executive branch just follows the President's orders rather than performing an independent analysis of what "faithful execution" entails.

Even *Marbury*, the case which the D.C. Circuit claims controlled its decision, agrees that only a subset of executive action is subject to judicial review. As Chief Justice Marshall wrote, "where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, *nothing can be more clear than that their acts are only politically examinable*"—in other words, subject to punishment by congressional impeachment or defeat at the ballot box rather than in a courtroom. 5 U. S., at 166 (emphasis added). It would be nonsensical to hold that the President's discretionary exercises of executive authority are judicially reviewable in instances where the acts of the President's agents in carrying out those same orders are not. This would invert the standard "enjoin the subordinate's action, not the President's order" schema discussed in Section I(C). *See Clinton*, 520 U. S., at 718–19 (Breyer, J., concurring).

The President's unique status can be discerned not only from constitutional structure, but from subsequent congressional enactments. Congress has recognized that when it comes to the President of the United States—one of only two people elected by the

whole of the nation, who pursues policies with an eye towards building the public support necessary to win reelection—separating the "official" from the "political" is no easy task. For example, most Executive Branch employees are subject to the restrictions on political activity imposed by the Hatch Act—except for the President and the Vice President, both of whom are specifically exempt. *See* 5 U. S. C. § 7322(1). This demonstrates Congress's recognition that the President, unlike most other actors in our constitutional system, wears multiple hats at the same time.

Given the President's unique role and responsibilities, at the very least Presidents should not be entitled to *less* immunity than other government officials. The doctrine of qualified immunity protects governmental defendants from suffering legal reprisal not only "in cases where legal principles were unclear at the time of the disputed conduct," but also when "matters may have been handled differently in the calm of retrospective appraisal." *Stachen* v. *Palmer*, 623 F.3d 15, 18 (1st Cir. 2010) (internal citations omitted). "The aim of the doctrine in both cases is to avoid the chilling effect of second-guessing where the [defendant], acting in the heat of events, made a defensible (albeit imperfect) judgment." *Id.*

The fact that qualified immunity exists at all contradicts the D.C. Circuit's holding below. When the D.C. Circuit states that the mere fact that the indictment alleges former President Trump's official

acts "violated generally applicable criminal laws[] mean[s] those acts were not properly within the scope of his lawful discretion," it is saying that it is never permissible for the President to take any action that someone, somewhere, could allege violates some broadly-worded statute. But lower-ranking governmental officials like police officers still receive the protection of qualified immunity even when their actions in the course of their duties have caused significant and obvious harm. *See, e.g.*, *Corbitt* v. *Vickers*, 929 F.3d 1304, 1308, 1323 (11th Cir. 2019) (holding that police officer was entitled to qualified immunity after accidentally shooting a child).

Moreover, it is difficult to imagine how the prospect of incarceration could be *less* chilling to presidential decision-making than the prospect of civil damages liability under 42 U. S. C. § 1983. Qualified immunity weighs the tradeoff between "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson* v. *Callahan*, 555 U. S. 223, 231 (2009). It would be absurd to carefully weigh these competing values in the civil context only to discard the scale in the criminal context, when the potential harm to a defendant impinges on his liberty rather than merely his pocketbook.

And though the Supreme Court has held that "the policy considerations which compel civil immunity for certain governmental officials" like prosecutors and

judges do not "place them beyond the reach of the criminal law," it has reserved such limited instances of criminal liability for "*willful* acts." *Imbler* v. *Pachtman*, 424 U. S. 409, 429 (1976) (emphasis added). This willfulness standard undermines the D.C. Circuit's contention that the mere enactment of a federal criminal statute deprives executive branch officials of all discretion over how best to conform their official conduct to the requirements of law, and highlights the notice problem inherent in imposing criminal liability for official acts that were not clearly prohibited at the time they occurred. Only certain defendants are protected by qualified immunity, but all defendants receive the benefit of "[t]he basic principle that a criminal statute must give fair warning of the conduct that it makes a crime" before liability can be imposed. *Bouie*, 378 U. S., at 350–51.

### B. The Existence of a Specific Constitutional Remedy for Alleged Presidential Misconduct Weighs Against the Creation of an Alternative.

Recognizing that delineating between the official and political acts of the President is always a difficult—and sometimes an impossible—enterprise, the Founders assigned primary responsibility for that fraught task to a group of people who are experts in drawing such lines: Members of the United States Congress. Like the President, Senators and Representatives hold dual roles as occupants of and candidates for federal office. While Members of

Congress are bound by their own unique ethical rules promulgated by each chamber that differ from those applicable to the President, they are at least familiar with the ethical balancing act that the President must perform because they deal with similar challenges on a smaller scale every day. Federal prosecutors simply cannot say the same.

The Impeachment Clause sets out the sole constitutional mechanism (other than electoral defeat) for removing a President from office. *See* U. S. Const. Art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."). Article I of the Constitution vests "the sole power of impeachment" in the House of Representatives, and "the sole Power to try all Impeachments" in the Senate. *Id.*, at Art. I, §§ 2, 3. "The remedy of impeachment demonstrates that the President remains accountable under law *for his misdeeds in office*." *Fitzgerald*, 457 U. S., at 758, n.41 (emphasis added). In other words, if a President is alleged to have violated federal law via his official acts, impeachment is the way to address that.

This enumerated constitutional remedy—impeachment and removal from office—has already been cited by this Court in *Fitzgerald* as a guard against the actions of a President vested with broad immunity. In holding that former Presidents enjoy absolute immunity from civil lawsuits arising out of their official acts as President, the Court explained that

"[a] rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment." *Id.*, at 757. Moreover, the Court identified other "formal and informal checks" that can uniquely counter executive action, including "constant scrutiny by the press" and "[v]igilant oversight by Congress." *Id.*

No one can credibly claim that a President who was subjected to a special counsel investigation and *two* congressional impeachment processes while in office escaped these kinds of countervailing pressures. The existence of the impeachment power is particularly relevant in this scenario because the special counsel is not the first federal actor to investigate the events that are the subject of the underlying indictment. Congress has already reviewed the conduct for which former President Trump has now been charged with federal crimes, and Congress decided that it did not warrant removal. That should have ended the matter.

As the Supreme Court held in *Fitzgerald*, "[t]he existence of alternative remedies and deterrents establishes that absolute immunity will not place the President 'above the law'" as the D.C. Circuit fears. *Id.*, at 758. That is just as true in the criminal as in the civil context, and any allegation to the contrary "is rhetorically chilling but wholly unjustified." *Id.*, at 758, n.41. Reversing the D.C. Circuit's decision will not elevate the President beyond the reach of law because "[i]t is simply error to characterize an official as 'above

the law' because a particular remedy is not available against him." *Id.* Recognizing the President's unique role as the repository of all executive power within our constitutional system, the Constitution created a unique remedy for addressing and punishing a President's conduct in office. It will not undermine that system to limit the availability of alternative remedies.

### C. Affirming the Lower Court Will Open the Floodgates to Additional Criminal Indictments Predicated on Official Presidential Action.

Not every impeachment inquiry will result in the punishment that a President's political opponents believe he deserves, but that is not a reason for prosecutors and the courts to go hunting for an alternative. The panoply of procedural protections for criminal defendants contained in the Bill of Rights reflect "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U. S. 358, 372 (1970) (Harlan, J., concurring). By principally vesting Congress with the power to punish a President for his official conduct, the Framers advanced that same principle. By contrast, affirming the decision below would undermine the constitutional objective of protecting the innocent by incentivizing the continuing partisan weaponization of criminal law.

The *Youngstown* case is again illustrative. To reiterate, that case ended with a district court

injunction restraining the challenged executive action. *See* 343 U. S., at 582–84, 589. That's it. The steel mills got their property back, but nobody went to jail for the President's unlawful seizure of an entire industrial sector—not even the man who gave the unlawful order.

Imagine if instead, several years after Truman left office, an enterprising U. S. Attorney appointed by his Republican successor filed charges against the former Democrat President alleging that he stole private property when he ordered the military to seize the steel mills. The temptation to file criminal charges would be equally enticing to an elected state prosecutor whose constituents are politically opposed to the former President (although state prosecutions may present separate issues of federalism). After all, these prosecutors could argue, isn't that the upshot of the Court's decision in *Youngstown*? If the Supreme Court already determined that the President's order violated federal law, why can't the lawbreaking President be subjected to criminal liability for his unlawful act?

The D.C. Circuit's logic can be stretched even further: If Presidents do not have broad immunity against criminal prosecution, then there is no reason for prosecutors to wait for an initial judicial determination of the illegality of a given executive action before filing charges.

Recently, a coalition of States tried to hold the Biden administration civilly responsible for its policy of prioritizing only certain categories of criminal

noncitizens for arrest and removal in defiance of federal law, but this Court held that they lacked standing. See *United States* v. *Texas*, 143 S. Ct. 1964, 1968–69 (2023). With civil avenues for accountability now blocked, what if a future Republican-appointed U.S. Attorney attempted to hold President Biden criminally responsible for his presidential policy of nonenforcement? The Immigration and Nationality Act imposes criminal liability for various broad offenses that do not require a defendant to know they have violated the law. See, *e.g.*, 8 U.S.C. § 1324(a)(1)(A)(ii) (making it a crime to "transport[], or move[] or attempt to transport or move [an] alien within the United States" "in reckless disregard of the fact" that they are in the country illegally); *id.* § 1324(a)(1)(A)(iv) (making it a crime to "encourage[] or induce[] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law"). These sound like the kinds of "generally applicable criminal laws" that the D.C. Circuit claims automatically remove issues from "within the scope of [the President's] lawful discretion." 91 F.4th at 1192. Such prosecutions need not be legally airtight to create headaches for the criminal justice system and former President Biden.

Abrogating immunity for a President's official acts could even upend the executive's traditional authority over the conduct of foreign affairs. The special counsel conceded that immunity might be "proper" in this

realm when questioned by the D.C. Circuit about the Obama administration's killing of American citizens by drone strike. D.C. Cir. Oral Arg. Tr. 49:18–22. When family members of the Americans killed attempted to sue Obama administration officials for civil damages, their lawsuit was dismissed. *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 58 (D.D.C. 2014). Could they have obtained a different result through criminal avenues if they had been equipped with the D.C. Circuit's new rule?

As demonstrated, reasons of constitutional structure and basic prudence caution against imposing criminal liability for official presidential acts. First, as explained, federal courts routinely strike down or enjoin executive action as unlawful when they determine the action under review violates the federal Constitution or federal statutes. See, *e.g.*, *Biden* v. *Nebraska*, 143 S. Ct. 2355 (2023) (striking down Biden student loan forgiveness program); *NFIB* v. *Department of Labor*, 142 S. Ct. 661 (2022) (staying Biden COVID-19 vaccine mandate); *Alabama Ass'n of Realtors* v. *HHS*, 141 S. Ct. 2485 (2021) (striking down Biden's extension of COVID-19 eviction moratorium). But no court has previously assumed that the power of judicial review extends to the criminal prosecution of a President for acting in accordance with what he saw as his constitutional duties, even if a federal court determines he was wrong on the merits.

Second, Petitioner is correct that the D.C. Circuit decision sets the country on a slippery slope toward the

complete partisan weaponization of criminal law. The panel waved away these serious concerns, explaining that it is unworried about the prospect "of a torrent of politically motivated prosecutions" because "this is the first time since the Founding that a former President has been federally indicted." 91 F.4th at 1197. True, but it requires a certain degree of willful blindness on the part of the Court to assume that it will be the last.

The precedent that the D.C. Circuit has now established will act as an accelerant on an already raging fire. There is a first time for everything, and once a court adopts a new rule, that precedent will inevitably be applied by future courts facing analogous factual scenarios. "Overruling precedent is never a small matter. Adherence to precedent is a foundation stone of the rule of law." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2422 (2019) (internal citations omitted). Armed with the D.C. Circuit's new precedent abrogating presidential immunity for official acts, each subsequent criminal prosecution of a former President will be easier than the first.

Moreover, although the D.C. Circuit has crafted a new *legal* rule, it does not write upon a blank societal slate. During the first two centuries of the American experiment, there occurred only a single presidential impeachment. *See* W. Rehnquist, Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson 274 (1992). In just the last quarter-century, there have been three (two of which, incidentally, involved the defendant in this case), with

a fourth impeachment inquiry ongoing. See The Basis for an Impeachment Inquiry of President Joseph R. Biden, Jr.: Hearing Before the Comm. on Oversight & Accountability, 118th Cong. (Sept. 28, 2023). One cannot look at this trend and reasonably conclude that the pace of governmental investigations into alleged presidential misconduct is declining.

Finally, it is impossible to separate the D.C. Circuit's assessment of the "slight" risk of prosecution that its decision creates for future Presidents from its opinion on the uniquity of this case. 91 F.4th at 1197. Reading the decision below, it is difficult to escape the conclusion that the lower court believes that President Trump deserves to face punishment for his actions in the wake of the 2020 election, and therefore he cannot be the beneficiary of any immunity that would enable him to escape punishment. *See id.*, at 1180 (noting that "hundreds of people who breached the Capitol on January 6, 2021, have been prosecuted and imprisoned," and contrasting those consequences with the delayed indictment of Trump). But this approach misconstrues the concept of immunity by elevating the *perceived* culpability of a particular defendant over the basic protections that inure to all defendants in a similar position (and, in this case, to all Presidents).

Put simply, the D.C. Circuit does not think that its decision creates any problems for future Presidents because it incorrectly believes that the novelty of this case and its impression of President Trump's guilt set it apart. The Court reasons by syllogism: If no former

President has previously been indicted for their official acts and President Trump has, then President Trump's actions in office must have been uniquely blameworthy. This rationale is untethered to political reality, and the bright-line rule that the Court thinks it has drawn around Trump's conduct is drawn on shifting sand.

The D.C. Circuit claims that "former President Trump has become citizen Trump, with all of the defenses of any other criminal defendant," *id.*, but Trump is not just another defendant. The D.C. Circuit may purport to apply the same rules to Trump that it applies to other defendants, but for the reasons elucidated in this brief it is clear the lower court thinks its decision will only harm one person who it has already decided should be punished for the conduct alleged.

The specific allegations against former President Trump and the Court's opinion as to his culpability should not control the outcome here because the consequences of the lower court decision will reverberate through future presidential administrations. If this Court affirms the D.C. Circuit's abrogation of presidential immunity for official acts, then legislative and judicial immunity could be next on the chopping block, and no one "could stand upright in the winds that would blow then." R.Bolt, A Man for All Seasons: A Play in Two Acts 66 (First Vintage Int'l. ed. 1990).

## CONCLUSION

This Court should reverse the decision below for both its flawed interpretation of controlling law and the disastrous practical consequences.

March 19, 2024

Respectfully submitted,

JONATHAN P. LIENHARD
*Counsel of Record*
ANDREW B. PARDUE
ANDREW D. WATKINS
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
15405 John Marshall Hwy.
Haymarket, VA 20169
(540) 341-8808 (telephone)
(540) 341-8809 (facsimile)
jlienhard@holtzmanvogel.com

JESSICA FURST JOHNSON
JONATHAN FAHEY
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
2300 N Street NW, Ste. 643
Washington, DC 20037
(202) 737-8808 (telephone)
(540) 341-8809 (facsimile)

*Counsel for Amici Curiae*