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 ALABAMA AND 17 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER DONALD J. TRUMP

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INTEREST OF *AMICI CURIAE*

The States of Alabama, Florida, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, and West Virginia respectfully submit this brief as *amici curiae* in support of Petitioner Donald J. Trump.

The Supreme Court's presidential-immunity jurisprudence weighs the interest in judicial action against the dangers of intruding on the Executive Branch. Here, the United States has repeatedly invoked the "public interest" in law enforcement to justify its prosecution of President Trump. The court below agreed. And it assured that the chance of "politically motivated prosecutions" is "slight." App.34A-35A.

Amici States represent broad swaths of the public, millions of Americans who are concerned by the prosecution's zeal to try President Trump before the upcoming presidential election. Particularly after the government waited *thirty months* to bring its case, the sudden rush to trial is suspicious. Whether or not this case was timed to silence or imprison President Biden's political rival, the perception of impropriety is enough reason to doubt that the public interest lies with the Special Counsel.

Amici States have observed the same troubling dynamic play out in suits across the country. Prosecutors purport to represent the People, but their approach toward President Trump suggests ulterior motives. The Court should take seriously the risk that exposing former Presidents to criminal liability will enable partisan abuse.

SUMMARY OF ARGUMENT

In 2015, Donald Trump announced his candidacy for President at Trump Tower in New York City. Fast forward nine years, and the Attorney General of New York is threatening to take the building that bears his name, to dissolve his companies, and to ban him from the real estate business. District attorneys in New York City and Fulton County are threatening to imprison him for the rest of his life. And in this case, the United States of America is rushing to try the sitting President's leading challenger in time for the 2024 election. To say that "President Trump has become citizen Trump," like "any other criminal defendant," App.3A, is to ignore the obvious: If he had not been President, none of this would be happening.

It is not just permissible for the Court to take stock of the risk that partisan motives may cloud prosecutorial judgment; this Court's immunity framework calls for it. In this structural inquiry, the Court must weigh the interest served by judicial action against the danger of intrusion on the Presidency. *See Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982). A higher likelihood of abuse diminishes the public interest in prosecution and aggravates the potential distortion of presidential decision-making.

Such concerns are not new. The Founders frequently worried that partisan factions, animated by their passions and animosities, would cast aside the public good. In response, they devised our system of separated powers, including a unitary executive who would represent the whole People. At the same time, the Founders ensured that the President would be

accountable to the People for his official acts through the mechanism of impeachment.

The court below exposed every President to the threat of future prosecution by his political opponents. Not to worry, the court said, for "[p]rosecutors have ethical obligations not to initiate unfounded prosecutions." App.35A. Thus, "the risk that former Presidents will be unduly harassed by meritless federal criminal prosecutions appears slight." *Id.*

But this very case shows that the risk of partisan prosecutions is anything but "slight." Extensive reporting suggests that, early on, senior officials and career prosecutors scuttled the theory of the indictment, and a probe began only after significant political pressure, including leaks from the White House that President Biden wanted "decisive action" against President Trump. The sitting President would later declare in November 2022 that he was "making sure" President Trump would not "take power." Days later, the Special Counsel received his mandate, and it was off to the races.

After waiting 30 months to indict President Trump, the Special Counsel has demanded extreme expedition from every court at every stage of the case. His only stated reason, the "public interest," is so thin it's almost transparent. No criminal defendant but this one is forced to brief a novel constitutional issue in a few weeks, to oppose a petition for certiorari before judgment, to forgo en banc review, and more. The prosecution's failure to explain its extraordinary haste suggests one troubling answer: That the timing of the prosecution is designed to inflict maximum

damage on President Biden's political opponent before the November 2024 election.

Unfortunately, the concern that partisans may abuse the justice system is not limited to this case and this prosecutor. There are criminal and civil actions against President Trump around the country, in some cases led by individuals who campaigned on promises to target President Trump. They taunt him and gloat to fawning media. They launch sprawling investigations and scour state codes with one man in mind.

Because the risk of vexatious and partisan prosecutions is more than "slight," the court below erred. Its structural analysis was fundamentally flawed, and this Court should reverse.

ARGUMENT

I. This Court's Immunity Jurisprudence Must Remain Sensitive to the Danger of Vexatious and Partisan Prosecutions.

A. The Question is Whether Criminal Prosecution for Official Acts Would Intrude on the Structure and Function of the Presidency.

Presidential immunity is a matter of constitutional structure. The question is not only the scope of executive power, but also which presidential acts can be proscribed by Congress and punished by the judiciary. "Although the Court [has] … described the requisite inquiry as one of 'public policy,' the focus of inquiry more accurately may be viewed in terms of the 'inherent' or 'structural' assumptions of our scheme of government." *Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.26 (1982); *see also Cleavinger v. Saxner*, 474 U.S. 193,

201-02 (1985). One such assumption is that the "system [is] structured to achieve effective government." *Fitzgerald*, 457 U.S. at 748. To that end, "the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. 748, 757 (1996).

When defining the scope of presidential immunity, the Court has "long recognized" the unique demands of the office. *Clinton v. Jones*, 520 U.S. 681, 697-98 (1997). While prosecutors, lawmakers, and judges also must "perform their designated functions effectively without fear … [of] personal liability," *id.* at 693, the presidency has "singular importance" because he alone "must make the most sensitive and far-reaching decisions," *Nixon*, 457 U.S. at 751-52. One person embodies the entire branch, the entire executive power. And unlike any one legislator or judge, the President is elected to represent the whole sovereign, We the People. Thus, more than any other official, the President must "devote his undivided time and attention to his public duties" and requires "maximum ability to deal fearlessly and impartially with the public at large." *Clinton*, 520 U.S. at 693, 697. What the court below found to be a "striking paradox" (that the President's unique duties come with unique powers) is a feature of our constitutional structure. *Compare* App.36A-37A *with, e.g.*, *Trump v. Vance*, 140 S. Ct. 2412, 2425 (2020) ("Quite appropriately, those duties come with protections that safeguard the President's ability to perform his vital functions."); *Clinton*, 520 U.S. at 711-13 (Breyer, J., concurring in judgment); *Fitzgerald*, 457 U.S. at 750.

The ultimate question, then, is whether the President's amenability to prosecution of a certain kind will "impair the effective performance of his office." *Clinton*, 520 U.S. at 702. In *Clinton*, Justice Breyer distinguished two kinds of harms: (1) "time and energy *distraction*," applicable to sitting Presidents, and (2) "official decision *distortion*," "applicable *both* to sitting *and* former Presidents." *Id.* at 720-22 (Breyer, J., concurring); *accord Vance*, 140 S. Ct. at 2426. Thus, the Court must consider the chance that mere "[c]ognizance of this personal vulnerability" could undermine the Executive to the detriment of the Nation. *Fitzgerald*, 457 U.S. at 753; *see also Clinton*, 520 U.S. at 694 & n.19 (describing "needless worry" over liability, "rendering the President 'unduly cautious in the discharge of his official duties,'" as the Court's "central" and "dominant concern" in *Fitzgerald*); *Butz v. Economou*, 438 U.S. 478, 524 (1978) (Rehnquist, J., concurring in part) (describing liability as a potential "outside influence[] which might inhibit an official in the free and considered exercise of his official powers"); Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1461 (2009) ("[A] President who is concerned about an ongoing criminal investigation is almost inevitably going to do a worse job as President.").

In some respects, the "distortion" effect may be more damaging than "distraction." *See Vance*, 140 S. Ct. at 2426. First, courts can guard against excessive "distraction" by case-by-case evaluation. In *Clinton*, for example, the Court relied in part on its own prediction that "the case at hand" was "highly unlikely to occupy any substantial amount of [President

Clinton's] time." 520 U.S. at 702. Presidents "face a variety of demands on their time," "some private, some political," and the added demand of that case did not rise to the level of a constitutional violation. *Id.* at 705 n.40. The same analysis cannot be conducted *ex ante* for a President's future liability once he leaves office, so the courts cannot be an effective check.

Second, a sitting President has the "constitutional and effectual power of self-defense" to use his powers "as a shield" against encroachment. The Federalist No. 73. A former President is comparatively powerless against abuse. *Cf. Trump v. Mazars USA, LLP*, 591 U.S. 848, 861 (2020); *id.* at 891 (Alito, J., dissenting) ("[H]eavyweight institutions can use their considerable weapons to settle the matter."). Consequently, the limitations of both the judiciary and a former President are reasons to be especially concerned about liability distorting presidential decisions.

B. The D.C. Circuit's Structural Analysis Underestimated the Danger of Vexatious and Partisan Prosecutions.

The court below understood its duty to take a "functional approach," accounting for "concerns of public policy" and "constitutional … structure." App.30A-31A. The court endeavored to balance "the constitutional weight of the interest to be served" by prosecution "against the dangers of intrusion on the authority and functions of the Executive Branch." App.31A (quoting *Fitzgerald*, 457 U.S. at 754). Relevant to both sides of the ledger is the risk of vexatious and partisan prosecutions. If the type of prosecution under review is ripe for abuse, then the interest to be served carries much less constitutional weight.

Likewise, if the President may be targeted for reasons beyond the demands of justice, he becomes personally liable for a broader set of actions, which heightens the intrusion on his office. *See Fitzgerald*, 457 U.S. at 756 (the President must not be amenable for "virtually every allegation").

At every step of its analysis, the court below discounted the threat. The court underestimated the general "risks of chilling Presidential action," "permitting vexatious litigation," "and opening the floodgates to meritless and harassing prosecution." App.31a-32a. And it dismissed out of hand the more specific problem of "politically motivated prosecutions as soon as [Presidents] leave office." App.34A. The court's mistreatment of both concerns infected its functional analysis and tipped the scales for the prosecution.

1. As to the general chilling effect on Presidential action, the court first relied upon a poor analogy to jurors. *See* App.32A-33A ("We cannot presume that a President will be unduly cowed by the prospect of post-Presidency criminal liability any more than a juror…."). But the comparison is utterly inapt. What is the baseline risk that a prosecutor would target a juror for personal or political gain? The court did not say. In contrast, "the sheer prominence of the President[]," "the visibility of his office[,] and the effect of his actions on countless people" make him an "easily identifiable target." *Fitzgerald*, 457 U.S. at 752-53; *see also Mazars*, 591 U.S. at 868 ("[A] demand may aim to harass the President or render him 'complaisant….'"); *Vance*, 140 S. Ct. at 2447 (Alito, J., dissenting); *Harlow v. Fitzgerald*, 457 U.S. 800, 827 (1982) (Burger,

C.J., dissenting) (citing "utterly frivolous and even bizarre" lawsuits as deterrents to public service).

Moreover, the magnitude of presidential decisions is such that "a President must concern himself with matters likely to 'arouse the most intense feelings.'" *Fitzgerald*, 457 U.S. at 752. Indeed, "American history is littered with examples of allegedly 'criminal' behavior by Presidents in their official acts." Stay Appl. 24. There can be no comparison to the "remote and shadowy" risk to a juror, one only a "timid soul" would fear. App.32A.

Next, the court below reasoned that presidents already believe they can face criminal liability, so the risk of "chilling Presidential action appears to be low." App.34A. But the court cited just three examples from which it could only *infer* that a few Presidents shared the court's view. *See* App.33A-34A. None of the Presidents cited actually admitted his amenability to criminal prosecution after leaving office. The historical record is complicated by the absence of prosecution despite high-profile accusations of criminality, Stay Appl. 22-24, from which it could be inferred that officials believed the President to be immune.

Finally, the court's three-sentence argument that prosecuting Presidents serves a "structural benefit" (App.34A) has no support in this Court's presidential-immunity precedents. And it proves far too much. This Court's entire immunity doctrine rests on the structural concerns discussed above. If constitutional structure cut the other way—if it benefitted our system of separated powers for the President "to hesitate" any time his act could implicate "rights," *id.*—there would be no argument for *any* kind of immunity.

That implication, not even endorsed by the prosecution here, is firmly rejected by precedent and history. *See, e.g.*, *Fitzgerald*, 457 U.S. at 750 n.31 ("But would the executive be independent of the judiciary … if the several courts could bandy him from pillar to post … and withdraw him entirely from his constitutional duties?" (quoting Thomas Jefferson)); *cf.* CADC Doc. 2033810 at 33 (Resp. Br.) (admitting that "prosecution of a sitting President is out of the question").

The court also relied on the generic interest in "the enforcement of criminal laws," App.35A-36A, but any degree of immunity could be said to impede "justice in criminal prosecutions" and "conflict[] with the function of the courts." App.36A. By contrast, this Court in *Vance* appealed to the "the public interest in fair and effective law enforcement" only "in the absence of a need to protect the Executive." 140 S. Ct. at 2430.

2. The case for immunity is heightened when it protects against partisan abuse. Partisanship is not only a structural concern that animated the Founders, but also a real and present danger today, *see infra* §II. Notably, the court below recognized such risk in the *civil* context, App.34A-35A (citing *Fitzgerald*, 457 U.S. at 756), yet found it to be "slight" in the criminal context, *id*. Again, the analysis was lacking.

First, the court recited the prosecutor's "ethical obligation[] not to initiate unfounded prosecutions." App.35A. That's not good enough. If it were, the President would need civil immunity only as to pro se litigants, *contra Fitzgerald*, because civil litigators also have ethical obligations not to bring unfounded civil actions. It is fair to "assume that the great majority of [] prosecutors will carry out their responsibilities

responsibly," but "there is a very real risk that some will not." *Vance*, 140 S. Ct. at 2450 (Alito, J., dissenting). The risk has extra weight in cases implicating the independence of a whole branch of government. *See United States v. Johnson*, 383 U.S. 169, 179 (1966).

Even the Department of Justice does not blindly trust the prosecutor's self-restraint, which is why it has multiple rules prohibiting partisan decision-making. *See* U.S. Dep't of Justice, Justice Manual §§9-27.260, 9-85.500. Nor does the Attorney General share the lower court's credulity. *See* Memorandum from Merrick Garland, Atty. Gen., to All Dep't Emps.: Election Year Sensitivities (May 25, 2022) ("Garland Memorandum") (reminding prosecutors that "partisan politics must play no role"). It was precisely because this "extraordinary" case demands greater "independence" and "even-handed[ness]" that the Attorney General felt compelled to appoint a special counsel. *See* U.S. Dep't of Justice, *Appointment of a Special Counsel* (Nov. 18, 2022), www.justice.gov/opa/pr/appointment-special-counsel-0. The prosecution itself does not ignore these political realities. Neither should the judiciary. *See Vance*, 140 S. Ct. at 2447 (Alito, J., dissenting).

Concerns about political prosecutions are not new, and our constitutional system is designed to mitigate them. In contrast to the idealism of the court below, the Founding Generation was deeply troubled by the problem of "factions." *See, e.g.*, Washington's Farewell Address (1796), *in* 35 The Writings of George Washington 224-27 (J. Fitzpatrick ed. 1940) (fearing the "alternate domination of one faction over another,

sharpened by the spirit of revenge"); The Federalist No. 14 ("[T]he diseases of faction … have proved fatal to other popular governments…."). Addressing complaints that in democracies, "the public good is disregarded in the conflicts of rival parties," James Madison agreed with the premise. The Federalist No. 10. He cited the "propensity of mankind to fall into mutual animosities," to "divide[] … into parties," and "to vex and oppress each other rather than to co-operate." *Id.* "It is in vain to say that enlightened statesmen" will ensure the common good prevails, for "[e]nlightened statesmen will not always be at the helm." *Id.*; *see also id.* No. 51 ("If men were angels…."); *id.* No. 15.

One solution to factions is the separation of powers, *see, e.g.*, The Federalist 51, and another is our form of republicanism, *see, e.g.*, *id.* No. 10, No. 27, No. 61. Still a third is a strong unitary executive. Citing the "Roman story," Alexander Hamilton argued that the executive must be empowered to combat "the enterprises and assaults of ambition, of faction and of anarchy." *Id.* No. 70. A strong executive can act "decisively" and with "dispatch" "to protect the polity … from factional strife." Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 Ark. L. Rev. 23, 38 (1994). And a President who "represents the nation as a whole" is less susceptible to a faction's attempt to "'purchase' the President and his national constituency." *Id.*; *see also* Frank H. Easterbrook, *Unitary Executive Interpretation: A Comment*, 15 Cardozo L. Rev. 313, 318-19, 321 (1993).

The basic design of the unitary executive bears heavily on the present matter. Respondent's theory

would enable a faction to issue credible threats of life imprisonment to a sitting President. It would be surprising if the Founders structured the presidency to counteract factions yet left it so susceptible to their capture. Even the Impeachment Clause, some objected, could render the President a "tool of a faction." 5 Debates on the Constitution 334 (J. Elliot ed. 1866) (Gouverneur Morris); *id.* at 340-42. But Hamilton and others won the debate, and the President would be restrained by a limited tenure and liability to removal. *See, e.g.*, The Federalist 69. These checks are not ripe for abuse because they are vested in the Nation as a whole: The People elect the President, and the People (through their representatives) can remove him.

The Court employed similar reasoning to explain the distinction between *Fitzgerald* and *Clinton*: the President is "amenable to [the law] in his private character as a citizen, and in his public character by impeachment." *Clinton*, 520 U.S. at 696 (quoting James Wilson). "With respect to acts taken in his 'public character'—that is, official acts—the President may be disciplined *principally by impeachment*," but "he is otherwise subject to the laws for his purely private acts." *Id.* (emphasis added); *see also Fitzgerald*, 457 U.S. at 757 (listing means by which "the Nation" holds the President accountable); Joseph Story, 2 Commentaries on the Constitution §762 (1833); Raoul Berger, Impeachment: The Constitutional Problems 83-85 (1974); Kavanaugh, 93 Minn. L. Rev. at 1462 ("No single prosecutor, judge, or jury should be able to accomplish what the Constitution assigns to the Congress."). The lesson of *Clinton* and *Fitzgerald* is that the character of the act bears on the available remedy. *Contra*

CADC Doc. 2033810 (Resp. Br.) at 32-33. While the line between public and private "is not always [] clear," *Mazars*, 591 U.S. at 868, the attempt to draw one makes good structural sense.

The D.C. Circuit devoted one paragraph to the possibility of partisan prosecution, which is striking given the background of this case and others around the country. *See infra* §II. Beyond its assurance that prosecutors act ethically, the court claimed there are "additional safeguards in place to prevent baseless indictments." App.35A. The only one identified was "the right to be charged by a grand jury." *Id.* (citing *Vance,* 140 S. Ct. at 2428). But in *Vance*, this Court did not rely on the grand-jury right alone to discharge concerns over a state prosecutor's harassing subpoenas. The grand jury is some protection, to be sure, but the Court twice emphasized that an aggrieved President can seek relief from harassing state subpoenas in federal court. 140 S. Ct. at 2428-29. The oversight of a separate sovereign alters the structural calculus.

The court below also underestimated the risk of "a torrent of politically motivated prosecutions" on the ground that "this is the first time since the Founding that a former President has been federally indicted." App.35A. Glaringly absent is the fact this case is the second of two federal prosecutions against President Trump, who also faces two state prosecutions. How can the "risk" possibly "appear[] slight"? *Id.* Further, the court's argument is missing a premise. The history is probative only if Presidents and state prosecutors generally thought they *could* prosecute former Presidents for their official acts but declined to do so. And the history is predictive only if the conditions giving

rise to these four prosecutions will abate. To the extent that such actions are motivated by partisan politics, the court's "predictive judgment" of a "slight" risk seems optimistic. *Id.*; *see also* 520 U.S. at 722-23 (Breyer, J., concurring) ("I am less sanguine.").

And if the D.C. Circuit was focused only on "the risk that former Presidents will be unduly harassed by *meritless* federal criminal prosecutions," App.35A (emphasis added), the court failed to appreciate how even colorable but flawed prosecutions can unduly harass. Talented lawyers equipped with broad federal statutes have repeatedly secured convictions before having their "sweeping expansion[s] of federal criminal jurisdiction" undone by this Court. *Cleveland v. United States*, 531 U.S. 12, 24 (2000) (unanimously rejecting government's reading of federal mail fraud statute); *see also, e.g.*, *Skilling v. United States*, 561 U.S. 358, 409-10 (2010) (rejecting government's reading of 18 U.S.C. §1346 as too broad); *cf. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) ("Section 361(a) is a wafer-thin reed on which to rest such sweeping power," including "criminal penalties."). In *Yates v. United States*, the Court rejected the government's attempt to read a provision of the Sarbanes-Oxley Act of 2002 "expansively to create a coverall spoliation of evidence statute." 574 U.S. 528, 549 (2015). The following year, the Court unanimously held that the former Governor of Virginia could not be sent to federal prison for "merely setting up a meeting, hosting an event, or contacting an official." *McDonnell v. United States*, 579 U.S. 550, 556 (2016).

And particularly relevant here, in 2021, the Executive Branch discovered new prosecutorial authority in another provision of Sarbanes-Oxley. "Section 1512(c)(2) has been on the books for two decades and charged in thousands of cases—yet until the prosecutions arising from the January 6 riot, it was uniformly treated as an evidence-impairment crime." *United States v. Fischer*, 64 F.4th 329, 377 (D.C. Cir.) (Katsas, J., dissenting), cert. granted, 144 S. Ct. 537 (2023). The Executive Branch's broad reading of the statute "would sweep in advocacy, lobbying, and protest." *Id.* at 378. This Court will soon consider that expansive reading of the federal criminal code too.

The D.C. Circuit thus failed to appreciate that a President has more to worry about than just "baseless indictments." App.35a. Even convictions this Court has reversed may not have involved completely "meritless federal prosecutions," but defendants in those matters have a strong case that they were "unduly harassed." *Id.* And when the government has previously read federal criminal statutes with such "standardless sweep" that "public officials could be subject to prosecution, without fair notice, for the most prosaic interactions," *McDonnell*, 579 U.S. at 576, it is clear that the D.C. Circuit failed to properly weigh the risk of partisan prosecutions.

II. The Prosecutions of President Trump Appear Partisan.

A. The Timing of This Prosecution Suggests Political Motives That Should Bear on the Immunity Question.

1. Within weeks of January 6, 2021, the federal government brought "over 400 criminal cases" connected to the events.[1] In the following months, hundreds more were arrested across the country.[2] The scale of the effort was "unprecedented," making it "the most complex investigation ever prosecuted," according to the federal government. *Id.*

But the attention was not on President Trump. When a few members of the U.S. attorney's office wanted "to directly investigate Trump associates for any links to the riot," they were shot down.[3] The acting U.S. Attorney for the District of Columbia, senior Justice Department officials, and the top deputy to the FBI Director "quashed [the] plan." *Id.* Another proposal focused on the alleged "fake electors scheme"—the heart of this case—but the Justice Department

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[1] Scott Pelley, *Inside the prosecution of the Capitol rioters*, CBS News (March 22, 2021), www.cbsnews.com/news/capitol-riot-investigation-sedition-charges-60-minutes-2021-03-21/

[2] Clare Hymes, et al., *What we know about the 'unprecedented' Capitol riot arrests*, CBS News (Aug. 11, 2021), www.cbsnews.com/news/us-capitol-riot-arrests-latest/.

[3] Carol D. Leonnig, et al., *FBI Resisted Opening Probe Into Trump's Role in Jan. 6 For More Than a Year,* Wash. Post (June 20, 2023), www.washingtonpost.com/investigations/2023/06/19/fbi-resisted-opening-probe-into-trumps-role-jan-6-more-than-year/ (citing documents, notes, and "interviews with more than two dozen current and former prosecutors, investigators, and others with knowledge of the probe.").

"declined to investigate the matter." *Id.* Apparently, no one thought that President Trump had violated Sarbanes-Oxley.

A year passed, and there was still "no indication" of any case against President Trump despite "unrelenting pressure" from politicians and the media.[4] But the chorus grew louder and louder.

Finally, word got out in an explosive New York Times report that President Biden thought President Trump "should be prosecuted." *See* Benner, *supra*. And he "wanted Mr. Garland to act less like a ponderous judge and more like a prosecutor who is willing to take decisive action." *Id.* The story cited "interviews with more than a dozen people, including officials." *Id.* Around the same time that President Biden "confided to his circle," *id.*, "the Justice Department [became] suddenly interested in the [alleged] fake electors evidence it had declined to pursue a year earlier."[5]

For the first time in April 2022, "prosecutors and FBI agents jointly embarked on a formal probe of actions directed from the White House." *Id.* "Even then," the FBI was "tentative" and "stopped short of identifying the former president as a focus." *Id.* Why? The

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

[5] Leonnig, *supra*; *see also id.* ("One person directly familiar with the department's new interest in the case said it felt as though the department was reacting to … heightened media coverage.").

federal investigation simply "had not yielded any significant connection to Trump's orbit."[6]

Then in November 2022, President Biden declared that he was "making sure" President Trump "does not become the next President again."[7] "[W]e just have to demonstrate that he will not take power … if he does run." *Id.* Whether President Biden was referring to this case is unknown. But six days after those remarks, President Trump announced his candidacy. Three days later, the Special Counsel took over,[8] and swiftly began issuing subpoenas directed at communications with President Trump, Leonnig, *supra.*

Since indicting President Trump on August 1, 2023, the federal government has only exacerbated fears that its prosecution has partisan motives. At every turn, the prosecution has demanded to proceed "as promptly as possible," Stay Resp. 36, despite its own multi-year delay in bringing the case.

First, the prosecution demanded a January 2024 trial date despite the gargantuan discovery burdens on the defense. *See* DE38. Though the defense warned that there would be complex motions to dismiss, requiring extensive briefing, and an immunity argument that would result in a stay, *id.* at 52:1-9, the district court set trial for March 4, 2024. That date

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[6] *Id.*; *see also id.* ("Lawyers at the FBI and Justice Department launched into what became many weeks of debate over … whether to name Trump as a subject.").

[7] *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/.

[8] *See* U.S. Dep't of Justice, *Appointment*, *supra.*

was dead on arrival, but it enabled the prosecution, its *amici*, and the media to accuse the defense of seeking "delay." And the prosecution wielded that unfair charge to great effect.

The district court ruled on the immunity motion, a matter of first impression and "great constitutional moment,"[9] just two weeks after briefing. In the D.C. Circuit, the prosecution moved for expedited review and proposed an incredibly truncated briefing schedule. CADC Doc. 2030867. The motion cited little more than the ordinary public interest in the "prompt disposition of criminal charges." *Id.* at 2-3.

At the same time, the prosecution sought even more extraordinary relief from this Court in a petition for certiorari before judgment. Again, the prosecution demanded that immunity needed to be "resolved as expeditiously as possible," so the case could go to trial.[10] The petition predicted that absent certiorari before judgment, the Court would not hear and decide the case "this Term." *Id.* at 11.

But the prosecution underestimated the degree to which its urgency would be shared by the D.C. Circuit. The appellate court granted the motion to expedite, and the case was briefed, argued, and submitted in a matter of weeks. Within thirty days, the panel issued a lengthy opinion and threatened to remand, which might have lifted the stay, if President Trump did not move for a stay in this Court within a week. CADC Doc. 2038999. President Trump had no opportunity

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[9] Reply Br. 1, *United States v. Trump*, No. 23-624 (filed Dec. 21, 2023).

[10] Pet. 9, *United States v. Trump*, No. 23-624 (filed Dec. 11, 2023).

for en banc review, and the court effectively rejected a stay before being asked. Once the case arrived here, the prosecution suddenly opposed certiorari, alternatively asking for an expedited schedule if the Court were inclined to grant review.

The prosecution has still never explained why time is of the essence. "If this were any other defendant than Donald Trump, the rush to trial … would be deemed wildly unfair," wrote Professor Jack Goldsmith.[11] What makes President Trump different, the public suspects, is that he is the leading candidate in the 2024 election. According to many voices in the commentariat, the prosecution's urgency is all about trying President Trump before the election.[12] Not only does the appearance of impropriety erode public trust, but it raises serious questions of prosecutorial ethics. *See, e.g.*, ABA Standards for Criminal Justice 3-1.2(b), 3-1.7(f) (4th ed. 2017); U.S. Dep't of Justice, Justice Manual §9-85.500; Garland Memorandum at 1-2.

Fair or not, the United States has done nothing to disabuse the public of its suspicion. Amid the flurry of filings, the Attorney General told the public that the

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

[12] *See, e.g.*, *id.*; Elie Honig, *The Word Jack Smith Will Never Say*, N.Y. Magazine (Jan. 19, 2024) ("[H]is primary tactical objective has been to beat the election clock.") nymag.com/intelligencer/2024/01/the-word-jack-smith-will-never-say.html; 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] hop[es] … to prosecute Trump this year before the November election."), apnews.com/article/trump-justice-department-us-capitol-9ab9da935bc620d57c4192134f81acde.

timing of the case was "in the hands of the judicial system, not in our hands."[13] That's not quite right.

2. The history of this case bears on the structural immunity question in a variety of ways. First and foremost, the lengthy delay in bringing charges, followed by President Biden's promise to "mak[e] sure" President Trump "does not become the next President,"[14] followed by an unexplained rush to take him to trial, gives credence to the concern that factional interests can drive criminal investigations and prosecutions of the President for his official acts. Even if the origins and timing of this case are wholly innocent, there is no easy way for federal courts to identify pure motives before the damage is done. The best they can do is "presume." App.35A.

An irrebuttable presumption of good faith not only endangers a former President, who has no meaningful powers of his own to rebuff encroachments; it exposes the judiciary to abuse as well. If the prosecution's partiality is beyond reproach, then any resistance he faces is deemed political. And that's exactly what happened here. When the judiciary's neutrality impedes the prosecution, its supporters in the media cry "election interference,"[15] unfairly accusing courts of

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[13] Evan Perez, et al., Exclusive: Attorney General Merrick Garland says there should be 'speedy trial' of Trump as 2024 election looms, CNN (Jan. 19, 2024), www.cnn.com/2024/01/19/politics/merrick-garland-trump-speedy-trial/index.html.

[14] *Remarks by President Biden in Press Conference*, *supra*.

[15] Jesse Wegman, *The Supreme Court Gives Trump Just What He Wanted*, N.Y. Times (Feb. 28, 2024),

playing politics by not accommodating a prosecutor's apparently political timetable. Absent some way to guard against partisan prosecutions, both the Presidency and the Judiciary suffer. *See* Kavanaugh, 93 Minn. L. Rev. at 1461 ("Criminal investigations targeted at or revolving around a President are inevitably politicized by both their supporters and critics.").

Second, the specter of partisanship should play a role if the Court analyzes immunity in the context of "the allegations of the Indictment." App.37A. The court below paid special attention to the allegations that President Trump took actions to "neutralize the most fundamental check on executive power — the recognition and implementation of election results." App.40A. If this Court adopts a case-by-case approach, which finds some support in *Clinton* and *Vance*, it should equally apply that focus to the prosecution's interest in abrogating immunity. If the prosecution's interest is not public but private, then immunity is warranted to a greater degree in this case.

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www.nytimes.com/live/2024/02/27/opinion/thepoint#supreme-court-trump-immunity-delay; *see also* Kate Shaw, *Why the Supreme Court Should Clear the Way for a Pre-Election Trump Trial*, N.Y. Times (Mar. 11, 2024), www.nytimes.com/2024/03/11/opinion/trump-supreme-court-jack-smith.html ("[A] Supreme Court that delays its decision more than a few weeks will be actively and aggressively undermining the American public's ability to cast meaningful and informed votes for the office of president."); Thomas B. Edsall, *'This Could Well Be Game Over'*, N.Y. Times (Mar. 6, 2024), www.nytimes.com/2024/03/06/opinion/trump-trials-supreme-court.html (casting certiorari review as "a devastating blow to President Biden's campaign" and "undermin[ing] a key Democratic goal").

Third, the appearance of partisanship undermines any argument that the Special Counsel's independence provides a meaningful check. That proposition is dubious as a theoretical matter. *See Morrison v.* Olson, 487 U.S. 654, 729-31 (1988) (Scalia, J., dissenting); Calabresi, *supra*, at 95 ("Enforcement … by independent counsels is nothing more than an invitation to factionalism."). And it is worse in practice.[16] The background of this case strongly suggests that the appointment of "independent" counsel does not remove political influence.

Although the special-counsel regulations "seek to strike a balance between independence and accountability,"[17] the result may be the worst of both worlds. A special counsel may be just as susceptible to political influence as any other prosecutor, yet he has reduced accountability owing to his "independence." The Special Counsel here claims that "coordination with the Biden Administration" is "non-existent"[18] and that he acts "independently of many Department structures and chains of command."[19] The Court may consider

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[16] *See* Jack Goldsmith, *Jack Smith and Robert Hur Are the Latest Examples of a Failed Institution*, N.Y. Times (Mar. 12, 2024), www.nytimes.com/2024/03/12/opinion/special-counsel-jack-smith-merrick-garland.html.

[17] Office of Special Counsel, 64 Fed. Reg. 37,038, 37,038 (July 9, 1999).

[18] Gov't Mot. in Limine at 6, *United States v. Trump,* No. 1:23-cr-257-TSC (D.D.C. filed Dec. 27, 2023).

[19] Gov't Opp. to Mot. to Dismiss Based on the Appointment and Funding of the Special Counsel, at 16, *United States v. Trump*, No. 9:23-cr-80101-AMC (S.D. Fla. Filed Mar. 7, 2024); *but see*

these features of his position when the Special Counsel inevitably appeals to the "public interest" in this prosecution. The Court may also consider whether the "guardrails" at the Department of Justice have "ensure[d] that the legal process for determining criminal liability will not be captive to political forces." Stay Resp. 17.

B. Irregularities in Other Cases Against President Trump Underscore the Risks of Partisan Prosecutions.

This case is not the only one to raise concerns of partisanship. While the court below restricted its analysis to "meritless federal criminal prosecutions," App.35A, App.31A n.8, potentially partisan state prosecutions and civil actions against President Trump are relevant to the risk. Moreover, the Court's question presented was not limited to federal prosecution. This case may decide the extent of a former President's exposure to *thousands* of state and local prosecutors across the country who are "responsive to local constituencies, local interests, and local prejudices." *Vance*, 140 S. Ct. at 2428. Some prosecutors may have effective "guardrails" to prevent political influence, Stay Resp. 17, but some may not. And others may just jump the rails. Four ongoing cases against President Trump underscore the risks.

First, when the Fulton County District Attorney took office on January 1, 2021, she knew "almost

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Gov't Opp. to Mot. to Dismiss Based on Presidential Immunity at 8, *United States v. Trump*, No. 9:23-cr-80101-AMC (S.D. Fla. filed Mar. 7, 2024) (assuring that "prosecutions are conducted … under the supervision of the Attorney General").

immediately" that she would go after President Trump.[20] Indeed, she announced an investigation after just three days on the job—calling the President's actions "disturbing," insinuating that he had "commit[ted] a felony violation," and promising to "enforce the law without fear."[21]

While it is not unethical for a prosecutor to speak to the press, the District Attorney stoked "non-stop" media coverage.[22] Early in the case, her litigation-hold letters were published immediately by national outlets,[23] and she went on television to discuss the nascent investigation—even fielding questions about

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[20] Danny Hakim & Richard Fausset, *Inside a Georgia Prosecutor's Investigation of a Former President*, N.Y. Times (Aug. 24, 2023), www.nytimes.com/2023/08/15/us/fani-willis-donald-trump-georgia-investigation.html (noting that the D.A.'s office at the time faced "a deep backlog of cases exacerbated by the pandemic" and had "limited staff").

[21] @JustinGrayWSB, X (Jan. 4, 2021), twitter.com/JustinGrayWSB/status/1346126903141408772; *see also* Morgan Gstalter, *Georgia district attorney says she will 'enforce the law without fear or favor' following Trump call*, The Hill (Jan. 4, 2021), www.thehill.com/homenews/administration/532539-georgia-district-attorney-says-she-will-enforce-the-law-without-fear/.

[22] Order Disqualifying D.A.'s Office at 3, *In Re 2 May 2022 Special Purpose Grand Jury*, 2022-EX-000024 (Ga. Super. Ct. Jul. 25, 2022), www.fultonclerk.org/DocumentCenter/View/1235/Order-to-Disqualify-District-Attorney-7-25-2022.

[23] *See*, *e.g.*, Richard Fausset & Danny Hakim, *Georgia Prosecutors Open Criminal Inquiry Into Trump's Efforts to Subert Election*, N.Y. Times (Feb. 10, 2021), www.nytimes.com/2021/02/10/us/politics/trump-georgia-investigation.html.

President Trump's *mens rea*.[24] As the case progressed, the D.A. began appearing on "national media almost nightly," a fact that concerned the state court,[25] but won her plaudits from the press.[26] Her following grew; she attracted attention, *e.g.*, by tweeting derogatory political cartoons depicting President Trump.[27] This is the kind of prosecutor the Court's immunity jurisprudence should anticipate.

Within days of launching her reelection campaign, the District Attorney announced the indictment of

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[24] *Rachel Maddow: Georgia probe of Trump likely to look beyond Raffensperger call: Fulton County D.A. Willis* (MSNBC television broadcast Feb. 11, 2021), at 2:38-3:23, www.msnbc.com/rachel-maddow/watch/georgia-probe-of-trump-likely-to-look-beyond-raffensperger-call-fulton-county-d-a-willis-100901957509.

[25] Sean Keenan & Danny Hakim, *Judge Criticizes Georgia Prosecutor for Aiding Political Rival of a Trump Ally*, N.Y. Times (July 21, 2022), www.nytimes.com/2022/07/21/us/georgia-prosecutor-trump-fani-willis.html. Also troubling was the D.A.'s decision to host and headline a fundraiser for the political opponent of one of her investigative targets. *See id.* ("'The optics are horrific,' [the court] said."); *see also* Order Disqualifying D.A.'s Office, *In Re 2 May 2022 Special Purpose Grand Jury*, 2022-EX-000024 (Ga. Super. Ct. Jul. 25, 2022), www.fultonclerk.org/DocumentCenter/View/1235/Order-to-Disqualify-District-Attorney-7-25-2022.

[26] *See, e.g.*, Time Staff, *Who Will Be TIME's Person of the Year for 2023? See the Shortlist*, TIME (Dec. 4, 2023), www.time.com/6341947/person-of-the-year-2023-shortlist/ (announcing "Trump Prosecutors" as finalists for "Person of the Year").

[27] *See, e.g.*, @FaniforDa, X (Jul. 18, 2022), twitter.com/FaniforDA/status/1549163274897350657.

President Trump.[28] The sweeping allegations charge President Trump, his Chief of Staff, and a senior Department of Justice official with violating Georgia's Racketeering Influenced and Corrupt Organizations Act.[29] After two and a half years of investigating, the indictment revealed "little fresh evidence."[30]

The case has recently received fresh scrutiny, including hard questions about the District Attorney's motives in paying $650,000 to a special counsel who had little-to-no experience on major criminal cases, corruption cases, or RICO.[31] Both attorneys faced calls

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[28] Tim Darnell, *'We have an announcement' | Fulton DA Willis launches fundraising website*, Atlanta News First (Aug. 10, 2023), www.atlantanewsfirst.com/2023/08/10/fulton-da-launches-new-fundraising-website-trump-decision-nears/; *Fulton County DA Fani Willis holds press conference after Trump Georgia indictment*, 11 Alive (Aug. 14, 2023), https://tinyurl.com/bdexcm4d.

29 Indictment at 13, *Georgia v. Trump, et al.,* 23SC188947 (Ga. Super. Ct. filed Aug. 14, 2023).

[30] The Editorial Board, *Indictment Four: Trump as Racketeer*, Wall St. J, (Aug. 15, 2023), www.wsj.com/articles/donald-trump-georgia-indictment-fani-willis-rico-2020-election-brad-raffensperger-cd592c20.

[31] Richard Fausset & Danny Hakim, *Prosecutor in Trump Georgia Case Admits Relationship with Colleague*, N.Y. Times (Feb. 2, 2024), www.nytimes.com/2024/02/02/us/fani-willis-trump-georgia-nathan-wade.html; Serge F. Kovaleski & Richard Fausset, *How Allegations of an Office Romance Came to Complicate the Case Against Trump*, N.Y. Times (Jan. 20, 2024), www.nytimes.com/2024/01/20/us/nathan-wade-trump-prosecutor-atlanta.html; Amy Gardner, et al., *Nathan Wade, embattled prosecutor in Georgia Trump case, has little prosecution experience*, Wash. Post (Jan. 14, 2024), www.washingtonpost.com/national-security/2024/01/14/nathan-wade-fani-willis-georgia-trump/.

to resign.[32] On motion to disqualify the D.A.'s office, the court found "an odor of mendacity," "a willingness" to "wrongly conceal" facts, and a "significant appearance of impropriety that infects … the prosecution team."[33] The court ordered the D.A. herself to withdraw or remove the special prosecutor. *Id.* at 17.

Second, before he became the Manhattan District Attorney, Alvin Bragg had investigated President Trump and sued his administration "more than a hundred times," a selling point of Bragg's campaign.[34] For over three years, the office he sought had also been investigating President Trump for alleged fraud.[35]

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[32] Richard W. Painter, *Step Aside, Fani Willis,* The Atlantic (Feb. 18, 2024), www.theatlantic.com/ideas/archive/2024/02/fani-willis-fultun-trump/677506/; Clark D. Cunningham, *Why Fani Willis Should Step Aside in the Trump Case in Georgia*, N.Y. Times (Jan. 24, 2024), www.nytimes.com/2024/01/24/opinion/fani-willis-trump-georgia.html; Amy Gardner, *Top Fani Willis ally calls for lead prosecutor Nathan Wade to step aside*, Wash. Post (Jan. 20, 2024), www.washingtonpost.com/national-security/2024/01/20/norm-eisen-fani-willis-nathan-wade/.

[33] Order on Defs.' Mots. to Dismiss & Disqualify the Fulton County D.A., at 2, 15-16, *In Re 2 May 2022 Special Purpose Grand Jury*, 2022-EX-000024 (Ga. Super. Ct. Mar. 15, 2024), www.fultonclerk.org/DocumentCenter/View/4200/151-ORDER-03-15-2024.

[34] Jonah E. Bromwich, et al., *2 Leading Manhattan D.A. Candidates Face the Trump Question*, N.Y. Times (June 22, 2021), www.nytimes.com%2F2021%2F06%2F02%2Fnyregion%2Fmanhattan-district-attorney-trump.html.

[35] Jonah E. Bromwich, et al., *How Alvin Bragg Resurrected the Case Against Donald Trump*, N.Y. Times (Mar. 31, 2023), www.nytimes.com/2023/03/31/nyregion/alvin-bragg-trump-investigation.html.

But when the new D.A. looked into the case, the New York Times reported, he "had serious doubts."[36] The prosecutors could not prove that President Trump "had intended to break the law …, a necessary element to prove the case." *Id.* They had no "damning emails" and no "insider willing to testify." *Id.* As a result, the D.A. declined to indict President Trump, leading to the resignation of two top attorneys, one of whom had "c[o]me out of retirement to work on the investigation without pay." *Id.*

Months later—and after significant blowback from his electorate—the District Attorney assigned several new prosecutors to the matter.[37] In December 2022, the former Acting Associate Attorney General left the Justice Department to join the D.A.'s office. The new prosecutor had limited criminal experience, but he had tremendous experience suing this defendant.[38] A few months later, the D.A. announced a felony indictment on a campaign-finance theory that the former D.A. and his top prosecutors had "pivoted" away from but "never [formally] closed."[39]

Even those "eager to see [President Trump] held accountable" commented on "the noticeable absence of

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[36] Ben Protess, et al., *How the Manhattan D.A.'s Investigation Into Donald Trump Unraveled*, N.Y. Times (Mar. 5, 2022), www.nytimes.com/2022/03/05/nyregion/trump-investigation-manhattan-da-alvin-bragg.html.

[37] Bromwich, *Resurrected, supra.*

[38] Jonah E. Bromwich, *Manhattan D.A. Hires Ex-Justice Official to Help Lead Trump Inquiry*, N.Y. Times (Dec. 5, 2022), www.nytimes.com/2022/12/05/nyregion/alvin-bragg-trump-investigation.html.

[39] Bromwich, *Resurrected, supra.*

support" in the indictment.[40] Some excused the apparent political motives,[41] but others worried that the case set "a dangerous precedent for prosecutors."[42] Every "local prosecutor in the country will now feel that he or she has free rein to criminally investigate and prosecute presidents after they leave office."[43]

Third, while one New York prosecutor seeks to imprison President Trump, another appears dead set on bankrupting him. The Attorney General of New York "ran for office … on the promise of taking down

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[40] Kyle Cheney, et al., *Bragg's case against Trump hits a wall of skepticism—even from Trump's critics*, Politico (Apr. 5, 2023), www.politico.com/news/2023/04/05/alvin-bragg-case-against-trump-00090602; *see also, e.g.,* Ian Millhiser, *The dubious legal theory at the heart of the Trump indictment, explained*, Vox (Apr. 4, 2023), www.vox.com/politics/2023/4/4/23648390/trump-indictment-supreme-court-stormy-daniels-manhattan-alvin-bragg; Renato Mariotti, *The Gaping Hole in the Middle of the Trump Indictment*, Politico (Apr. 4, 2023), www.politico.com/news/magazine/2023/04/05/gaping-hole-trump-indictment-00090701.

[41] Ankush Khardori, *Trump Seems to Be the Victim of a Witch Hunt. So What?*, Politico (Mar. 30, 2023), www.politico.com/news/magazine/2023/03/30/trump-political-witch-hunt-indictment-00089011; Andrew Prokop, *Yes, Alvin Bragg's indictment of Trump is political*, Vox (Apr. 5, 2023), www.vox.com/politics/2023/4/1/23664751/trump-indictment-alvin-bragg-stormy-daniels.

[42] Jed H. Shugerman, *The Trump Indictment is a Legal Embarrassment*, N.Y. Times (Apr. 5, 2023), www.nytimes.com/2023/04/05/opinion/trump-bragg-indictment.html.

[43] Ankush Khardori, *Trump's Prosecution Has Set a Dangerous Precedent*, N.Y. Times (Apr. 1, 2023), www.nytimes.com/2023/04/01/opinion/trump-prosecution-precedent.html.

Mr. Trump."[44] She described a "country at war," and President Trump "at the eye of the storm."[45] In no uncertain terms, she stated that he could be "indicted" and "should be charged," and she promised to "join with other law enforcement and other attorneys general across this nation in removing [him]." *Id.* To put it lightly, "her outspokenness … has underscored the tension between an attorney general's pledge of impartiality and the political benefits of attacking [President Trump]."[46]

The Attorney General found the perfect weapon for her war: New York's Executive Law §63(12), which vaguely bars "repeated fraudulent or illegal acts." The theory of the case was simple: Any time President Trump or his accountants valued an asset more highly than the State's expert would, that was triable fraud. Never mind that the "purported victims," major financial institutions, had made money on the deals. Bromwich, *supra*. Under the statute, she didn't need a victim at all.

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[44] Allysia Finley, *Letitia James Sacrifices the Rule of Law to Get Trump*, Wall St. J. (Mar. 3, 2024), www.wsj.com/articles/letitia-james-sacrifices-the-rule-of-law-to-get-trump-dubious-fraud-suit-173963bc; *see also* Jonah E. Bromwich & Ben Protess, *Trump Fraud Trial Penalty Will Exceed $450 Million*, N.Y. Times (Feb. 16, 2024), www.nytimes.com/2024/02/16/nyregion/trump-civil-fraud-trial-ruling.html ("She campaigned for office promising to bring Mr. Trump to justice[.]").

[45] NowThisImpact, *Why Letitia James Wants to Take on Trump as NY's Attorney General*, YouTube (Sep. 28, 2018), www.youtube.com/watch?v=D1yj0NKSsuU.

[46] Jesse McKinley, *After Letitia James Wins Big in Courtrooms, She Celebrates in Public*, N.Y. Times (Mar. 10, 2024), www.nytimes.com/2024/03/10/nyregion/letitia-james-trump-nra.html.

The Attorney General secured a staggering $350 million civil penalty. Initially, the court even ordered *dissolution* of President Trump's principal businesses. *Id.* No company accused of the same violation had *ever* been "threatened with a shutdown without … obvious victims and major losses."[47] The court ultimately placed the companies under monitorship and suspended President Trump from running them. Bromwich, *supra.* The A.G. gloated. *See* McKinley, *supra.*

The ruling was so shocking that the Governor of New York felt the need to make a statement to reassure the public. "New Yorkers who are business people have nothing to worry about," she said, "because they're very different than Donald Trump."[48]

Fourth, the Special Counsel's case against President Trump in the Southern District of Florida, alleging "the unlawful retention of classified documents,"[49] has also raised concerns of selective prosecution. Past convictions under 18 U.S.C. §793(e) include, *e.g.,* a four-year sentence for a Navy seaman who "stuffed [a classified] document down his pants front and walked out of the building with it." *United States v. Chattin*, 33 M.J. 802, 805 (N-M. C.M.R. 1991). No one ranking

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[47] Bernard Condon, *Dissolving Trump's business empire would stand apart in history of NY fraud law*, AP News (Jan. 29, 2024), apnews.com/article/trump-fraud-business-law-courts-banks-lending-punishment-2ee9e509a28c24d0cda92da2f9a9b689.

[48] Lauren Irwin, *Hochul tells NY businesses not to fear about Trump verdict: 'Nothing to worry about'*, The Hill (Feb. 18, 2024), thehill.com/homenews/state-watch/4474774-hochul-tells-ny-businesses-not-to-fear-about-trump-verdict-nothing-to-worry-about/.

[49] Indictment ¶7, *United States v. Trump*, No. 9:23-cr-80101-AMC (S.D. Fla. filed June 8, 2023).

anywhere near the President has been prosecuted for unauthorized retention of documents.

For example, on July 5, 2016, the FBI Director announced investigative findings that the Secretary of State had been "extremely careless" in handling "very sensitive, highly classified information."[50] In response, the Department of Justice "worked until almost midnight on July 5 to finish [its] legal analysis" concluding "that there was no basis to recommend prosecution" under Section 793(e).[51] Later, the FBI Director would state that "the higher profile the matter, the more afraid sometimes the prosecutors are." *Id.* at 127.

Similarly, shortly after President Biden took office, he sent a White House employee to inventory his private D.C. office.[52] She reported back that there were "40 boxes" of documents and other items. *Id.* Through many visits to the office in 2022, White House employees and the President's personal counsel learned that some of the material dated to the Obama

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[50] *Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System*, FBI.gov (July 5, 2016), www.fbi.gov/news/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-e-mail-system.

[51] *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election*, at 253-54, 256, Off. of the Inspector Gen., U.S. Dep't of Justice (June 2018) ("OIG Review").

[52] Special Counsel Robert K. Hur, *Report on the Investigation Into Unauthorized Removal, Retention, and Disclosure of Classified Documents Discovered at Locations Including the Penn Biden Center and the Delaware Private Residence of President Joseph R. Biden, Jr.*, at 257 (Feb. 2024) ("Hur Report").

administration. *Id.* at 257-66. In November 2022, they informed the National Archives. DOJ and the FBI opened an inquiry.

A month later, President Biden's personal counsel discovered another batch of classified documents in the President's garage at his Delaware home. *Id.* at 22. In January 2023, counsel discovered more classified documents elsewhere in the home, *id.* at 24-26, as did the FBI in a later search, *id.* at 26-28.

Although the President's "team kept the matter under wraps," "it came out in the press."[53] The Attorney General appointed Special Counsel Robert Hur to lead the investigation. Hur Report at 26. Over the next six months, FBI agents continued to recover classified materials in various places, including the University of Delaware and the President's rental home in Virginia. *Id.* at 28, 33.[54] In all, agents reviewed over seven million documents and conducted over one hundred witness interviews. *Id.* at 29.

Special Counsel Hur ultimately found that President Biden had "willfully retained and disclosed classified materials," including "documents about military and foreign policy" and notes "about issues of national security … implicating sensitive intelligence sources and methods." *Id.* at 1. In doing so, he risked

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[53] Kevin Liptak, et al., *Former US attorney named special counsel in Biden document probe*, CNN (Jan. 12, 2023), www.cnn.com/2023/01/12/politics/joe-biden-classified-documents-counsels-office/index.html.

[54] Agents also learned that the President had disclosed classified national-security details to his ghostwriter, who deleted recordings of those conversations after he became aware of the Special Counsel's investigation. *Id.* at 103-06, 334-38.

"exceptionally grave damage to the national security." *Id.* at 132-33, 200, 253-55. The crime "that best fits the facts" is Section 793(e), *id.* at 178, the same provision used to charge President Trump. The Special Counsel declined to prosecute.

Meanwhile, Special Counsel Smith presses for a pre-election trial in the Florida case, which he says is not "remotely similar" to Hur's investigation.[55] At a recent scheduling conference, the district court reportedly asked whether a trial so close to the election would violate DOJ's "60-Day Rule,"[56] a concern the United States attorney rebuffed.[57] In response to President Trump's immunity defense, the Special Counsel asked the district court to certify the motion as "frivolous" in order to short-circuit a potential appeal and proceed to trial.[58]

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The risk of partisan prosecution of Presidents is real and present. At the bare minimum, the Court's

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[55] Gov't Opp. to Def. Donald J. Trump's Mot. to Dismiss the Indictment Based on Selective and Vindictive Prosecution at 2, *United States v. Trump*, No. 9:23-cr-80101-AMC (S.D. Fla. filed Mar. 7, 2024).

[56] *See, e.g.*, OIG Review at 17 (describing the "longstanding Department practice of delaying overt investigative steps or disclosures that could impact an election").

[57] Rebecca Shabad & Daniel Barnes, *Trump, DOJ lawyers spar over timeline for classified documents trial*, NBC News (Mar. 1, 2024), www.nbcnews.com/politics/justice-department/trump-classified-documents-case-florida-courthouse-appearance-rcna140687.

[58] Gov't Opp. to Donald J. Trump's Mot. to Dismiss Counts 1-32 Based on Presidential Immunity at 20-23, *United States v. Trump*, No. 9:23-cr-80101-AMC (S.D. Fla. filed Mar. 7, 2024).

analysis must account for such risks, as it did when it reaffirmed various "safeguards" "to protect against the predicted abuse" of harassing subpoenas in *Vance*. 140 S. Ct. at 2427-29. There, this "Court indicate[d] … that a court may not proceed against a President as it would against an ordinary litigant." *Id.* at 2432 (Kavanaugh, J., concurring in the judgment). Yet the court below authorized exactly that—the "ordinary" prosecution and punishment of former Presidents. App.45A, 46A, 51A. Worse, it abrogated immunity in this case without attempting to discern whether this prosecution is "ordinary."

The stakes of this case for President Trump and "our democracy," Stay Resp. 2, are significantly higher than they were in *Vance* or any other immunity case. Not only does President Trump face life in prison; the threat is issued by a prosecutor (at least nominally) under the control of his opponent in the upcoming election. It would be an injustice for the courts to treat President Trump like "any other criminal defendant" (App.3A) while the prosecution plainly does not.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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