No. 23A745

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

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

---

BRIEF *AMICI CURIAE* OF JOHN DANFORTH, J. MICHAEL LUTTIG, CARTER PHILLIPS, PETER KEISLER, LARRY THOMPSON, STUART GERSON, *ET AL.*, OPPOSING THE APPLICATION FOR A STAY OF THE D.C. CIRCUIT'S MANDATE PENDING THE FILING OF A PETITION FOR WRIT OF CERTIORARI

February 13, 2024

Matthew W. Edwards
1300 19th Street NW
Washington, DC 20006

Nancy A. Temple
Katten & Temple, LLP
209 S. LaSalle Street, Suite 950
Chicago, IL 60604

Richard D. Bernstein
Counsel of Record
1875 K Street NW, Suite 100
Washington, DC 20006
(301) 775-2064
rbernsteinlaw@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Other Authorities

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*

Pursuant to Sup. Ct. R. 37.4, the *amici* listed in Appendix A submit this brief. *Amici* include former officials who worked in six Republican administrations from Presidents Nixon to Trump, senior officials in the White House and Departments of Justice, Homeland Security, and Defense, former elected Republican officials, and others who support a strong Presidency.[1] Reflecting their experience, *amici* have an interest in a strong Presidency where each elected President serves only the term or terms to which he or she has been elected. *Amici* speak only for themselves personally, and not for any entity or other person.

INTRODUCTION AND SUMMARY OF ARGUMENT

Rejection of absolute immunity in this case is essential to protecting Article II's design of the Presidency itself. This *amici* brief focuses on one reason why Mr. Trump has failed to make two of the mandatory showings required for a stay. The judgment below to deny immunity is so clearly correct as applied to the harrowing allegations in the Indictment that there is neither "a fair prospect that a majority of the Court will vote to reverse the judgment below," *Hollingsworth v. Perry,* 558 U.S. 183, 190 (2010) (*per curiam*), nor "a reasonable probability that four Justices will consider the issue *sufficiently meritorious* to grant certiorari." *Id.* (emphasis added). Presidential immunity should never be so broad as to embolden an outgoing President's violations of federal criminal statutes as part of efforts to prevent what

[1] *Amici* state that no counsel for any party authored this brief in whole or in part and that no entity, aside from *amici* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

Article II mandates—the vesting of the authority and functions of the Presidency in the next, lawfully-elected President.

One of the multiple bases to deny a stay here follows from the denial of a stay in *Trump v. Thompson*, 142 S. Ct. 680 (2022) (mem.). In *Thompson*, unlike here, the D.C. Circuit had addressed in dicta "unprecedented" questions that "raise serious and substantial concerns" about whether and when a former President could successfully invoke executive privilege despite the incumbent President's determination to waive the privilege. *Id.* At least one Justice disagreed with that dicta. *Id.* But a stay cannot be predicated on anything that ultimately "made no difference to the [appellate] court's decision." *Id.* The Court therefore denied a stay by a vote of 8-1 because the judgment of the D.C. Circuit was fully sustained by one or more narrower bases in the D.C. Circuit's decision. *Id.*

Here, one dispositive basis that fully sustains the judgment of the D.C. Circuit is that a President does not have immunity to engage in federal statutory crimes to subvert presidential election results and prevent the vesting of executive power in the newly-elected President. App'x at 31A, 37A-41A. A core allegation of the Indictment is that Mr. Trump knew that it was false to say there had been "outcome-determinative voting fraud in the [2020] election," but nonetheless engaged in criminal lies and conspiracies "to overturn the legitimate results of the 2020 presidential election and retain power."[2] Under these allegations, former President Trump's violations of federal criminal statutes were directed to usurping

[2] Indictment (D. Ct. Dkt. No. 1), ¶¶ 2, 4, 7-8; *see also, e.g., id.* at ¶¶10-13, 15, 19-20, 22, 25, 29-33, 35-37, 41, 45-46, 50, 52, 56, 64, 66-67, 70, 74, 77, 81, 83, 86, 90, 92, 99-100, 102, 104, 116, 118.

the authority and functions of the Presidency for the current term to which President Biden was legitimately elected. That constitutes an alleged effort to violate Article II, Section 1, Clause 1, also called the Executive Vesting Clause, and the Twentieth Amendment.

Former President Trump's alleged effort to usurp the Presidency presents an especially weak case for extending the court-created doctrine of presidential immunity to a criminal prosecution. *Nixon v. Fitzgerald,* 457 U.S. 731 (1982), emphasized that the justification for even civil absolute immunity is not to protect any individual President, but rather "the Nation that the Presiden*cy* was designed to serve." *Id.* at 753 (emphasis added). The last thing that would serve the Nation or the Presidency would be to embolden Presidents who lose re-election to engage in federal criminal statutory violations, through official acts or otherwise, as part of efforts to *prevent* the vesting of executive power required by Article II in their lawfully-elected successors. The scope of criminal immunity proposed by former President Trump would turn *Nixon v. Fitzgerald* on its head by encouraging the greatest possible threat of "intrusion on the authority and functions of the Executive Branch," *id.* at 754 — a losing President's efforts to usurp the authority and functions of a duly-elected successor President.

Mr. Trump mischaracterizes the D.C. Circuit as rejecting federal criminal immunity for former Presidents in "*all*" contexts. App'n at 1, 11, 25. This ignores the D.C. Circuit's narrow holding that: "The Executive Branch's interest in upholding Presidential elections and vesting power in a new President under the

Constitution and the voters' interest in democratically selecting their President . . . compel the conclusion that former President Trump is not immune from prosecution under the Indictment." App'x at 31A. The Court emphasized: "[O]ur analysis is specific to the case before us, in which a former President has been indicted on federal criminal charges arising from his alleged conspiracy to overturn federal election results and unlawfully overstay his Presidential term." *Id.; accord id.* at 57A (public policy "compel[s] the rejection of his claim of immunity in this case"). As the court reiterated: "We cannot accept former President Trump's claim that a President has unbounded authority to commit crimes that would neutralize the most fundamental check on executive power—the recognition and implementation of election results." *Id.* at 40A. Under *Trump v. Thompson*, the holding in these quotations by itself warrants denial of the application for a stay.

Although *amici* agree with the rest of the D.C. Circuit's analysis, this Court should deny a stay *even if* this Court might not. The demonstrable need to deter attempted usurpation of the Presidency by itself provides a compelling ground that sustains the judgment below denying federal criminal immunity in this case. Because of at least this ground, denying a stay would not preclude possible federal criminal immunity for a President's official acts in some different, exceptional situation. Nor would the Court have to address whether any alleged criminal conduct here was an official act.

Preservation of the Presidency designed by Article II requires rejection of immunity from prosecution for a President's engaging in violations of federal

criminal statutes to alter declared presidential election results, whether that conduct consists of acts as a candidate, official acts, or both. Here, for example, the former President argues that he was acting officially when he allegedly conspired to commit federal criminal conduct by using Department of Justice personnel to make false statements to state officials to support his efforts to overturn declared state election results. Indictment, ¶¶ 70, 75, 78-79, 84. If that qualified for absolute immunity, the precedent would improperly encourage a future President to violate federal criminal statutes by deploying the military and armed federal agents in efforts to alter the results of a presidential election. *See* Part II.B, *infra*. This Court should deny a stay in this case because Mr. Trump's claim of such a boundless immunity is wrong.

ARGUMENT

I. A PRESIDENT WHO VIOLATES FEDERAL CRIMINAL STATUTES TO TRY TO STAY BEYOND HIS TERM IS ATTEMPTING TO VIOLATE THE EXECUTIVE VESTING CLAUSE AND THE TWENTIETH AMENDMENT.

Article II, Section 1, Clause 1 of the Constitution provides:

> The executive Power shall be vested in a President of the United States of America. He shall hold his Office *during the Term of four Years*, and, together with the Vice President, chosen for the same Term, *be elected*, as follows

(Emphases added.)

Former President Trump argues that he should be granted immunity from federal prosecution based on "the Executive Vesting Clause." App'n at 12. This has it backwards. The second sentence of the Executive Vesting Clause mandated that

Mr. Trump leave office at the end "of four years" because he lost. This mandate is reiterated by the Twentieth Amendment. Mr. Trump's alleged federal crimes were designed to usurp the Presidency in violation of the Executive Vesting Clause and the Twentieth Amendment. Granting immunity for such criminal conduct would encourage future Presidents likewise to seek to prevent the vesting of executive power in their lawful successors.

The Constitutional Convention initially adopted provisions of a draft Constitution that would have elected a President for a single seven-year term and made each President ineligible for re-election. 1 M. Farrand ed., *Records of the Federal Convention,* 64, 68-69 (1911). The Convention later switched course and enabled a President to seek re-election, but the Executive Vesting Clause required that President to leave at the end of his term if he lost.

This important change was explained by Edmund Randolph to the Virginia Ratifying Convention. Randolph explained that his original position at the Constitutional Convention had been "that the reeligibility of the President was improper." 3 J. Elliot ed., *The Debates in the Several State Conventions* 485 (2d ed. 1836). He "altered [his] opinion" and subsequently defended the Constitution's permission for re-election by relying on the mandates of the Executive Vesting Clause. *Id.* at 485-86. He stated that a sitting President "may [not] hold his office without being reelected. He cannot hold it over four years, unless he be reelected, any more than if he were prohibited [from running]." *Id*. at 486. Randolph stated

that a President who loses re-election is "displaced at the end of the four years" by the Executive Vesting Clause. *Id.* at 486.

As Chief Justice Marshall put it, "the president is elevated from the mass of the people and, *on the expiration of the time for which he is elected*, returns to the mass of the people again." *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (Marshall, Circuit Justice) (emphasis added). Therefore, "the first magistrate of the Union may more properly be likened to the first magistrate of a state," rather than to a "monarch." *Id.* The Twentieth Amendment reiterates the mandate that a President peacefully relinquish executive power to his or her successor: "The terms of the President and the Vice President *shall end* at noon on the 20th day of January . . .; and the terms of their *successors shall then begin.*" (Emphases added).

Any President who loses re-election, but violates federal criminal statutes to try to usurp the office of the Presidency beyond his four-year term, would be threatening to violate the Executive Vesting Clause and the Twentieth Amendment in two inseparable ways. First, that President would be threatening to extend the four-year term in which executive power has been vested by election in that President. Second, that President would be threatening to prevent the vesting of the authority and functions of the Presidency in the *newly-elected* President. Part II of this brief demonstrates one reason why a former President does not have immunity from federal prosecution for criminal conduct employed in attempts to violate the Executive Vesting Clause and the Twentieth Amendment.

II. IMMUNITY DOES NOT PROTECT A PRESIDENT'S VIOLATIONS OF FEDERAL CRIMINAL STATUTES IN ATTEMPTING TO SUBVERT PRESIDENTIAL ELECTION RESULTS.

A. Protecting The Presidency Designed By Article II Requires Rejecting Absolute Immunity For Federal Criminal Violations In Efforts To Overturn Presidential Election Results.

What kind of Constitution would immunize and thereby embolden losing first-term Presidents to violate federal criminal statutes—through either official or unofficial acts—in efforts to usurp a second term? Not our Constitution, where the mandates of the Executive Vesting Clause and the Twentieth Amendment are: four years, you lose re-election, you get out, and the Presidency is vested in your successor. Indeed, George Washington's Farewell Address stated that it would "destroy[]" our constitutional system if "cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and usurp for themselves the reins of government." Washington's Farewell Address, at 14 (1796).[3]

No case supports former President Trump's dangerous argument for federal criminal immunity. *Nixon v. Fitzgerald* addressed immunity from civil damages. The reasoning of *Nixon v. Fitzgerald* was that the Court "must balance the constitutional weight of the interest to be served [by civil damages] against the dangers of intrusion on the authority and functions of the Executive Branch." 457 U.S. at 754. The Court cautioned that "[i]n defining the scope of an official's absolute privilege, . . . the sphere of protected action must be related closely to the immunity's justifying purposes." *Id.* at 755.

---

[3] *Available at* https://www.govinfo.gov/content/pkg/GPO-CDOC-106sdoc21/pdf/GPO-CDOC-106sdoc21.pdf.

Nixon v. Fitzgerald reserved deciding whether presidential absolute immunity applies at all—much less in which cases—to violations of criminal statutes enacted by Congress and signed by a President. *Nixon v. Fitzgerald* explained that the requisite balancing would be different: "[t]he Court has recognized . . . that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions." *Id.* at 754 & n.37.

In *Trump v. Vance,* 140 S. Ct. 2412 (2020), then-President Trump sought an immunity from a state grand jury subpoena concerning conduct outside his official duties. Justice Kavanaugh's concurrence stated that when even a sitting President seeks an immunity in a new context, a court had to "balance" the "interests of the criminal process and the Article II interests of the Presidency." *Id.* at 2432. In *Vance,* as in *Nixon v. Fitzgerald,* "the Article II interests of the Presidency" were entirely on the side of the sitting or former President.

In marked contrast to those cases, the current case involves a prosecution for a President's alleged federal crimes that threatened the most serious "intrusion on the authority and functions of the Executive Branch," *Nixon v. Fitzgerald*, 457 U.S. at 754. An outgoing President threatened the foundation of Article II—the Executive Vesting Clause, as reiterated in the Twentieth Amendment—by allegedly violating federal criminal statutes to try to usurp the functions and authority of a lawfully-elected successor President. In this new and different context, both the "interests of the criminal process" *and* "the Article II interests of the Presidency" oppose federal criminal immunity.

Amici are not advocating individual case-by-case balancing. This case presents a rare category where immunity would encourage a President to commit a federal crime as part of an effort to usurp the Presidency itself. This category does not present any clash between the Executive Branch and the legislative or judicial branch. To the contrary, where a prosecution under a federal criminal statute protects *the Presidency* against this greatest of injuries to *the Presidency*, there can be no separation of powers issue.

Even *assuming* presidential immunity from federal criminal statutes might apply in an exceptional situation outside this particular category, immunity should not extend within this particular category. Section 1 of Article II, as reiterated by the Twelfth and Twentieth Amendments, protects the Presidency by specifying *who* is vested with executive powers. The interests of Article II *support* a criminal prosecution of a former President in cases that protect Article II's assignment of "who" is vested with executive powers. *Amici* believe that protecting the Constitution also opposes federal criminal immunity in a case involving only "how" executive powers were executed.[4] But the Executive Vesting Clause and Twentieth

[4] The boundless immunity proposed by Mr. Trump would encourage a President, in contravention of 18 U.S.C. § 2, to instigate violations of federal criminal statutes that protect important constitutional foundations in addition to the peaceful transfer of executive power. *See, e.g.,* 31 U.S.C. §§ 1341(a), 1350 (knowingly and willfully spending government money without a congressional appropriation); 18 U.S.C. § 245(b)(1)(A) (willfully by force or threat of force interfering with voting, campaigning, poll watchers, or acting as election officials in any election); 18 U.S.C. § 2383 (inciting, assisting, or engaging in "any rebellion or insurrection against the authority of the United States or the laws thereof"). *See Trump v. Anderson*, No. 23-719, Oral Arg. Tr. at 54 (U.S. Feb. 8, 2024) (Mr. Trump's counsel asserts that "presidential immunity" applies to prosecution "under 2383"). *See also infra,* at 14-16.

Amendment provide an additional, dispositive basis for denying immunity in the "who" category of federal criminal cases for four reasons.

First, the "who" category protects the Presidency designed by Article II itself. Article II is deeply concerned with ensuring that "who" is President is the person elected pursuant to Article II, not the person self-servingly determined by a sitting President. Nothing in Article II could justify immunizing and encouraging bold and decisive criminal conduct by a President to seize control of the office beyond the term to which he or she has been elected.

Former President Trump argues that the prospect of federal prosecution will have "Chilling Effects" on Presidents in *other* contexts. App'n at 2, 10-11, 22-28. Not only does this conflate the narrow "who" category with the broader "how" cases, when considering potential chilling effects, this Court also considers the "value [that] lies in protecting against . . . profound harms." *Counterman v. Colorado*, 600 U.S. 66, 80 (2023); *id.* at 107 (Barrett, J., dissenting) ("True threats carry little value and impose great cost."). There is no more profound threatened harm under Article II than the attempted usurpation of the Presidency.

Second, the "who" category protects Article II's design for presidential elections. The Executive Vesting Clause mandates—and the Twentieth Amendment reiterates—that a first-term President leaves at the end of a four-year term when the people have elected someone else. "To justify and check" the President's "unique [authority] in our constitutional structure," Article II "render[s] the President directly accountable to the people through regular elections." *Seila Law LLC v.*

Consumer Financial Protection Bureau, 140 S. Ct. 2183, 2203 (2020). Article II's "direct[] account[ability]" (*id.*) is antithetical to creating an absolute immunity from federal criminal prosecution that would immunize a President who loses re-election but violates federal criminal statutes in efforts to overturn the results.

Moreover, part and parcel of Article II's design for the Presidency is specifying which officials determine the presidential election results. The Executive Vesting Clause requires that the President "be elected, *as follows* . . . ." (Emphasis added.) Under the immediately following Clause 2 of Section 1 of Article II, state law sets forth which state officials determine which candidate won each state. Under Clause 3, as reiterated by the Twelfth Amendment, the lists of electoral votes are "open[ed]" and "counted" in the presence of Congress and the Vice President.

One key reason Article II did not assign even a ceremonial role to a President concerning presidential election results is that a President might try to avoid the ignominy of electoral defeat through dishonesty or intimidation. Contradicting this, former President Trump suggests that absolute immunity would protect from prosecution a former President who made a "corrupt bargain" with a Speaker of the House to steal the Presidency. App'n at 22 (discussing John Quincy Adams). But it would turn Article II on its head if absolute immunity were so broad that it encouraged a President to violate federal criminal statutes by seeking to corrupt, deceive, or intimidate the officials to whom, unlike the President, Article II assigns duties concerning presidential election results.

Third, because the "who" category protects Article II's design for the Presidency and presidential elections, there should be no immunity from federal prosecution for a President's criminal efforts to violate the Executive Vesting Clause, whether through official *or* unofficial acts. The "public interest," *Nixon v. Fitzgerald*, 457 U.S. at 754, could not be higher in federal criminal prosecutions that preserve and defend the provisions of Article II that design the Presidency itself and presidential elections. Enforcing those provisions is essential to fulfilling both Article II's design and "the trust of a Nation that here, We the People rule." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020).

Fourth, the rare "who" category involves the narrowest sliver of potential criminal cases. Unlike in *Nixon v. Fitzgerald,* recognizing the inapplicability of presidential immunity against a federal criminal prosecution for efforts to usurp the Presidency would not even arguably "subject the President to trial on virtually every allegation that an action was unlawful." 457 U.S. at 756. This is particularly compelling here because former President Trump relies only on chilling effects on presidential conduct in *other* contexts that do not involve criminal efforts to usurp the Presidency. *See Counterman*, 600 U.S. at 113 (Barrett, J., dissenting) (rejecting chilling effects argument, in part, because "only a very narrow class of statements satisfies the definition of a true threat").

B. Under Mr. Trump's View Of Absolute Immunity, A Future President Could Disregard Federal Criminal Prohibitions Against Using The Military And Armed Federal Agents To Alter Election Results.

Mr. Trump argues that he should not be denied federal criminal immunity based on a "lurid hypothetical[]" about a President's use of the military to commit crimes to keep that President in power. App'n at 24. But that kind of hypothetical follows both from what former President Trump allegedly did and repeatedly considered in pursuit of subverting the 2020 election results.

To start, the Indictment alleges that former President Trump "attempted to use the Justice Department to make knowingly false claims of election fraud to officials in the targeted states through a formal letter under the Acting Attorney General's signature" that urged "the targeted states to replace legitimate Biden electors with the Defendant's." Indictment, ¶¶70, 75. *See also id.* ¶¶78-79, 84. Mr. Trump argues these were official acts because the President "oversaw" and could "replace the Acting Attorney General." App'n at 5. Under Mr. Trump's vast rationale for federal criminal immunity, a future President would be emboldened to direct the Secretaries of Defense and Homeland Security, as well as the Attorney General, to deploy the military and armed federal agents to support efforts to overturn that President's re-election loss.

Absent federal criminal immunity, existing federal criminal statutes deter a President's use of the military and armed federal agents to alter presidential election results. In addition to the statutory provisions in the Indictment, 18 U.S.C. § 593 makes it a crime when "an officer or member of the Armed Forces of the United States . . . imposes or attempts to impose any regulations for conducting any general or special election in a State, different from those prescribed by law, or . . .

interferes in any manner with any election officer's discharge of his duties." 18 U.S.C. § 2(a) makes it a crime when anyone "aids, abets, counsels, *commands*, induces or procures" commission of an offense under 18 U.S.C. § 593. (Emphasis added.) *See* also 18 U.S.C. § 2(b) (criminalizing "[w]hoever willfully causes an act to be done which if directly performed by him *or another* would be an offense against the United States") (emphasis added)); § 371 (criminalizing "when two or more persons conspire . . . to commit any offense against the United States"). Moreover, 18 U.S.C. § 1385 makes it a crime when anyone "willfully uses any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space Force as a posse comitatus or otherwise to execute the laws" except "in cases and under circumstances expressly authorized by the Constitution or Act of Congress." [5]

Under 18 U.S.C. § 595, it is also a crime when any "person employed in any administrative position by the United States, or by any department or agency thereof, . . . uses his official authority for the purpose of interfering with, or affecting, . . . the election of any candidate for the office of President, Vice President, [or] Presidential elector." Under 18 U.S.C. § 2(a), a President commits a crime by commanding federal agents to commit an offense under 18 U.S.C. § 595.

Absolute immunity from criminal prosecution, however, would undo the protections provided by these federal criminal statutes. A future President could disregard these criminal statutes and deploy the military and armed federal agents

[5] Statutes like 18 U.S.C. §§ 593 and 1385 that govern the federal military services apply to "[m]embers of the National Guard called into Federal service." 10 U.S.C. § 12405; *see also, e.g.,* 10 U.S.C. § 10106 ("The Army National Guard while in the service of the United States is a component of the Army.").

to prevent the counting of votes in an unfavorable county or of a certain type (such as mail-in ballots) by seizing ballots and voting machines. Such absolute immunity also would encourage that President to use the military and armed federal agents to bar physically his or her opponent's electors from casting their electoral votes on the day and in the place required by 3 U.S.C. § 7 and state law. And absolute immunity from federal criminal liability under 18 U.S.C. §§ 1509, 401(3), and 2(a) and (b) would embolden a President to command the military and armed federal agents to defy court orders to desist. Indeed, before the D.C. Circuit's decision in this case, a Senate ally of Mr. Trump approvingly stated that a future President Trump could defy a Supreme Court ruling that related to the military.[6]

These terrifying possibilities are real, not remote. Indeed, after this Court refused to overturn the 2020 election results in *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020), there was a drumbeat of calls from allies of President Trump for him to deploy the military. The next day, on December 12, 2020, Lin Wood appeared on Newsmax and stated: "If the Supreme Court does not act, I think the president should declare some extent of Martial law, and he should hold off an[d] stay the electoral college . . . . [T]he electoral college does not need to meet and vote until we have resolved these [fraud and illegality] issues."[7]

---

[6] *See* T. Axelrod, *JD Vance says he wouldn't have certified 2020 race until the states submitted pro-Trump electors,* ABC News (Feb. 4, 2024), available at https://abcnews.go.com/Politics/jd-vance-defends-trump-claims-invoking-jean-carroll/story?id=106925954.

[7] Lin Wood to Newsmax TV: Trump Should Declare Martial Law (Dec. 12, 2020), available at https://www.newsmax.com/newsmax-tv/lin-wood-martial-law-georgia-brad-raffensperger/2020/12/12/id/1001228/.

An executive order was drafted and dated December 16, 2020, under which President Trump would have "order[ed]" that "the Secretary of Defense shall seize" voting machines and records, including by using federalized National Guard units.[8] According to *Politico,* the draft order was created by a lawyer assisting Rudy Giuliani in efforts to overturn the 2020 election results.[9]

On December 16, 2020, former General and National Security Advisor Michael Flynn, among others, reviewed the draft order. *Id.* On December 17, 2020, the draft order was changed to a presidential direction to the Secretary of Homeland Security to seize the voting machines and records, using National Guard units federalized by the Secretary of Defense. *Id.* Also that day, Mr. Flynn called for President Trump to seize voting machines and deploy "military capabilities" to "rerun an election in each of those [swing] states."[10]

In response, on December 18, 2020, the Army's Chief of Staff and Secretary issued a public statement that "[t]here is no role for the U.S. military in determining the outcome of an American election."[11] That day, President Trump dispatched the Director of the White House Presidential Personnel Office to inform

---

[8] B. Swan, *Read the never-issued Trump order that would have seized voting machines*, Politico (Jan. 21, 2022), *available at* politico.com (linking to draft order).

[9] B. Swan, *Read the emails showing Trump allies' connections to voting machine seizure push,* Politico (Feb. 9, 2022), available at https://www.politico.com/news/2022/02/09/trump-emails-voting-machines-election-00007449 (linking to December 16-17, 2020 emails).

[10] Michael Flynn to Newsmax TV: Trump Has Options to Secure Integrity of 2020 Election (Dec. 17, 2020) (linking to video), available at https://www.newsmax.com/politics/trump-election-flynn-martiallaw/2020/12/17/id/1002139/.

[11] U.S. Army Rejects Using 'Martial Law' on Election Fraud, Newsmax (Dec. 19, 2020), available at https://www.newsmax.com/newsfront/election-fraud-martial-law-army-no-role/2020/12/19/id/1002337/.

the Acting Secretary of Defense that the public statement of these Army officials "was entirely unacceptable." Jonathan Karl, *Tired of Winning,* 131, 133-34 (2023). That evening, President Trump met with Flynn, Giuliani, and others for four hours. *Id.* at 134. The next day, according to Trump campaign lawyer Jenna Ellis, the Deputy White House Chief of Staff stated: "[T]he boss is not going to leave under any circumstances. We are just going to stay in power."[12]

On January 3, 2021, co-conspirator 4, a Justice Department official, discussed potential use of military force. Indictment, ¶ 81. On January 15, 2021, Mike Lindell carried notes into a meeting with President Trump that stated "Insurrection Act *now* . . . martial law if necessary."[13] As late as January 17, 2021, Representative Marjorie Taylor Greene texted White House Chief of Staff Mark Meadows that "*several* [House members] are saying the only way to save our Republic is for Trump to call for Marshall [sic] law." *Id.* (emphasis added).[14]

The real possibility that absolute immunity might embolden a President to deploy the military also follows from a discussion in former President Trump's reply brief in the District Court. That brief asserted that during the dispute over the 1876

---

[12] A. Gardner & H. Bailey, *Ex-Trump allies detail effort to overturn election in Georgia plea videos*, Washington Post (Nov. 13, 2023), *Available at* https://washingtonpost.com/national-security/2023/11/13/trump-georgia-case-videos-overturn-2020-election/ (linking to proffer video).

[13] J. Alemany, J. Dawsey, and T. Hamburger, Talk of martial law, Insurrection Act draws notice of Jan. 6 Committee, Washington Post (Apr. 27, 2022) (emphasis in quoted notes), available at https://www.washingtonpost.com/politics/2022/04/27/talk-martial-law-insurrection-act-draws-notice-jan-6-committee/.

[14] *Accord* H. Walker, J. Komensky and E. Yucel, *Mark Meadows Exchanged Texts with 34 Members of Congress About Plans To Overturn the 2020 Election,* Talking Points Memo (Dec. 12, 2022) (quoting Jan. 17 text from Rep. Norman to Meadows), available at https://talkingpointsmemo.com/feature/mark-meadows-exchanged-texts-with-34-members-of-congress-about-plans-to-overturn-the-2020-election.

election, President Grant's "official actions [possibly] were criminal," yet he was not indicted. D. Ct. Dkt. No. 122, at 11-12. The clear import of that discussion is that absolute immunity should bar prosecution of a former President who "trailed greatly in the electoral college" and "dispatched federal troops to states to ensure that" their electoral votes were favorably awarded. *Id.* at 11-13.

Hamilton wrote in Federalist No. 85 that the Constitution sought to prevent a one-time "victorious demagogue" from remaining in power via "military despotism." Federalist No. 85.[15] Under former President Trump's view of absolute immunity, future first-term Presidents would be encouraged to violate federal criminal statutes by employing the military and armed federal agents to remain in power. No Court should create a presidential immunity from federal criminal prosecution, even for official acts, that is so vast that it endangers the peaceful transfer of executive power that our Constitution mandates.

C. Rejecting Absolute Immunity In This Case Would Not Prevent Presidents From Vigorously Challenging Election Results.

A state's laws designate the courts that hear and resolve any candidate's challenges to presidential election results in that state.[16] Even under the civil standard for absolute immunity, former President Trump lacks immunity for court cases pursued by him, as an office-seeker, to overturn the 2020 election results. App'x at 39A, 50A n.14. Mr. Trump's Application does not contend otherwise.

---

[15] Available at https://avalon.law.yale.edu/18th_century/fed85.asp.

[16] *See, e.g.*, Ariz. R.S. §§ 16-672 to 673, 16-675 to 677; Ga. Code Ann. §§ 21-2-520 to 528; Nev. R.S. §§ 293.407-423; Pa. Const., art. VII, § 13; 25 Pa. Stat. §§ 3291 (Class II), 3351-3352, 3456, 3471, 3473-3474; Wis. Stat. §§ 9.01(1)-(11).

Myriad state and federal courts thoroughly rejected both factual allegations and legal assertions in more than 60 court cases brought by Mr. Trump and his allies. *See* John Danforth, *et al., Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election,* at 3-5, 14-15, 33-35, 44-46, 51-52, 59-63, 68-69 (July 2022) (citing cases), available at www.lostnotstolen.org. The Indictment, however, mentions only two Georgia court filings as a basis for prosecution. On November 25, 2020, former President Trump retweeted about a lawsuit that contained false accusations of "massive election fraud" in voting machine software and hardware, even though former President Trump allegedly had conceded privately that these allegations were unsupported and "crazy." Indictment, ¶ 20. And on December 31, 2020, the former President signed a verification of a lawsuit's allegations after a co-conspirator allegedly had acknowledged that the former President was aware that some of the factual allegations were false. Indictment, ¶ 30.

The Indictment confirms that rejecting absolute immunity does not expose to prosecution here even inaccurate and deeply flawed post-election day court challenges, so long as they avoided fraudulent lies about material facts. Thus, absolute immunity from federal criminal prosecution cannot be necessary for an incumbent President to make vigorous challenges to election results.

CONCLUSION

This Court should deny the application.

February 13, 2024

Respectfully submitted,

Richard D. Bernstein
Counsel of Record
1875 K Street NW, Suite 100
Washington, DC 20006
(301) 775-2064
rbernsteinlaw@gmail.com

Matthew W. Edwards
1300 19th Street NW, Suite 300
Washington, DC 20036

Nancy A. Temple
Katten & Temple, LLP
209 S. LaSalle Street, Suite 950
Chicago, IL 60604

Counsel for Amici

APPENDIX A
LIST OF AMICI CURIAE[1]

Charles Stevenson Abbot, Admiral, United States Navy (Retired), Deputy Commander, United States European Command, 1998-2000; Deputy Homeland Security Advisor, 2001-2003.

Donald Ayer, Deputy Attorney General, 1989-1990; Principal Deputy Solicitor General, 1986-88; United States Attorney, Eastern District of California, 1982-1986; Assistant United States Attorney, Northern District of California, 1977-1979.

John Bellinger III, Legal Adviser to the Department of State, 2005-2009; Senior Associate Counsel to the President and Legal Adviser to the National Security Council, The White House, 2001-2005.

Louis Edward Caldera, Director of the White House Military Office, 2009; President, University of New Mexico, 2003-2007; Vice Chancellor for University Advancement at the California State University System, 2001-2002; United States Secretary of the Army, 1998-2001; Chief Operating Officer of the Corporation for National Service, 1997-1998; California State Assemblyman, 1992-1997; United States Army, Captain, 1978-1983; currently Senior Lecturer of Business Administration, Harvard Business School.

George Conway, Board President, Society for the Rule of Law; argued *Morrison v. National Australian Bank, Ltd.,* 561 U.S. 247 (2010).

John Danforth, United States Senator from Missouri, 1976-1995; United States Ambassador to the United Nations, 2004-2005; Attorney General of Missouri, 1969-1976.

Mickey Edwards, Representative of the Fifth Congressional District of Oklahoma, United States House of Representatives, 1977-1993; founding trustee of the Heritage Foundation and former national chairman of both the American Conservative Union and the Conservative Political Action Conference.

---

[1] The views expressed are solely those of the individual *amici* and not any organization or employer. For each *amicus,* reference to prior and current position is solely for identification purposes.

Stuart M. Gerson, Acting Attorney General, 1993; Assistant Attorney General for the Civil Division, 1989–1993; Assistant United States Attorney for the District of Columbia, 1972–1975.

John Giraudo, Attorney Advisor, Office of Legal Counsel, 1986-1988; Associate Deputy Secretary of Labor, December 1986-1988.

Peter Keisler, Acting Attorney General, 2007; Assistant Attorney General for the Civil Division, 2003-2007; Principal Deputy Associate Attorney General and Acting Associate Attorney General, 2002-2003; Assistant and Associate Counsel to the President, The White House, 1986-1988.

Edward J. Larson, Counsel, Office of Educational Research and Improvement, United States Department of Education, 1986-1987; Associate Minority Counsel, Committee on Education and Labor, United States House of Representatives, 1983-1986; formerly University of Georgia Law School Professor; currently Hugh & Hazel Darling Chair in Law at Pepperdine University.

J. Michael Luttig, Circuit Judge, United States Court of Appeals, 1991-2006; Assistant Attorney General, Office of Legal Counsel and Counselor to the Attorney General, 1990-1991; Assistant Counsel to the President, The White House, 1980-1981.

John M. Mitnick, General Counsel, United States Department of Homeland Security, 2018-2019; Associate Counsel to the President, The White House, 2005-2007; Deputy Counsel, Homeland Security Council, The White House, 2004-2005; Associate General Counsel for Science and Technology, United States Department of Homeland Security, 2003-2004; and Counsel to the Assistant Attorney General (Antitrust), United States Department of Justice, 2001-2002.

Carter Phillips, Assistant to the Solicitor General, 1981-1984.

Alan Charles Raul, Associate Counsel to the President, The White House, 1986-1988; General Counsel of the Office of Management and Budget, 1988-1989; General Counsel of the United States Department of Agriculture, 1989- 1993; Vice Chairman of the Privacy and Civil Liberties Oversight Board,2006-2008.

Paul Rosenzweig, Deputy Assistant Secretary for Policy, Department of Homeland Security, 2005-2009; Office of Independent Counsel, 1998-1999; United States Department of Justice, 1986-1991; currently Professorial Lecturer in Law, The George Washington University Law School.

Nicholas Rostow, General Counsel and Senior Policy Adviser to the U.S. Permanent Representative to the United Nations, New York, 2001-2005; Special Assistant to the President for National Security Affairs and Legal Adviser to the National Security Council, 1987-1993; Special Assistant to the Legal Adviser, U.S. Department of State, 1985-1987; currently, Senior Research Scholar at Yale Law School.

Robert Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, 1981-1984.

Christopher Shays, Representative of the Fourth Congressional District of Connecticut in the United States House of Representatives, 1987-2009

Michael Shepherd, Deputy Assistant Attorney General, 1984-86; Associate Counsel to the President, 1986-87.

Michael Edward Smith, Rear Admiral, United States Navy (Retired), President and Co-Founder American College of National Security Leaders, 2017-2022; currently President and Founder National Security Leaders for America.

Larry Thompson, Deputy Attorney General, 2001-2003; Independent Counsel to the Department of Justice, 1995-1998; United States Attorney for the Northern District of Georgia, 1982-1986; currently, John A. Sibley Chair of Corporate and Business Law at University of Georgia Law School.

Stanley Twardy, United States Attorney for the District of Connecticut, 1985–1991.

Christine Todd Whitman, Administrator, Environmental Protection Agency, 2001–2003; Governor, New Jersey, 1994–2001.

Wendell Willkie, II, Associate Counsel to the President, 1984-1985; Acting Deputy Secretary, U.S. Department of Commerce, 1992-1993; General Counsel, U.S. Department of Commerce, 1989-1993; General Counsel, U.S. Department of Education, 1985-1988; currently, adjunct Professor of Law at New York University and adjunct fellow at the American Enterprise Institute.

Richard Bernstein, Appointed by the United States Supreme Court to argue in *Carmell v. Texas*, 529 U.S. 513, 515 (2000); *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016).