

No. 23-939

IN THE
Supreme Court of the United States

DONALD J. TRUMP, *Petitioner*,

v.

UNITED STATES, *Respondent*.

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

Brief of *Amici Curiae*
**America's Future, Judicial Action Group, Gun
Owners of America, Gun Owners Fdn., Gun
Owners of Calif., Tenn. Firearms Assoc., Tenn.
Firearms Fdn., U.S. Constitutional Rights
Legal Def. Fund, and Conservative Legal Def.
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INTEREST OF THE *AMICI CURIAE*¹

America's Future, Judicial Action Group, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Tennessee Firearms Association, Tennessee Firearms Foundation, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

A. Criminal Charges.

Former President Donald Trump is the first former President of the United States to be indicted after leaving office for an alleged crime committed while President. Trump has been indicted in four separate jurisdictions since leaving office in January 2021: two federal (District of Columbia and Florida) and two state (Georgia and New York). These indictments include 91 separate federal and state charges, causing

¹ It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Trump to be facing felony charges that, combined, carry maximum prison sentences of 717.5 years.²

Partisan politics infects every aspect of these prosecutions. The two state prosecutors obtaining these indictments were both Democrats who opposed Trump's election in 2020 and now oppose him in 2024. The federal charges were brought by Special Counsel Jack Smith who was appointed by Attorney General Merrick Garland who, in turn, was appointed by Democrat President Biden.³ Democrat Biden and Republican Trump are long-standing political rivals. As Vice President, Biden supported Democrat Hillary Clinton against Trump in the 2016 Presidential race

² A. Durkee, "Trump's Total Charges Could Result In More Than 700 Years In Prison—Here's Why That's So Unlikely," *Forbes* (Aug. 22, 2023) (reporting maximum sentences as follows: New York – 136 years; Florida – 450 years; District of Columbia – 55 years; and Georgia — 76.5 years).

³ Although Attorney General Garland could have selected one of a hundred lawfully appointed federal prosecutors for this particular task, it is highly suspicious that he chose to entrust this partisan effort to a lawyer who is not even an "officer of the United States." See Brief of Former Attorney General Edwin Meese III, *et al.* as *Amici Curiae* in Support of Applicant at 9 (Feb. 20, 2024) ("Smith's lack of authority to prosecute Trump follows from first principles. In our constitutional system, Congress alone has the authority to create federal offices not established by the Constitution. And the Attorney General cannot ex nihilo fashion offices as he sees fit. Nor has Congress given the Attorney General power to appoint a Special Counsel of this nature. Thus, without legally holding any office, Smith cannot wield the authority of the United States, including his present attempt to prosecute the former President.").

and ran against Trump in the 2020 presidential election.

1. On March 30, 2022, former President Trump was indicted by a Manhattan grand jury in the first criminal case ever brought against a former President of the United States. The charges allege falsifying business records with respect to Trump's payments during the 2016 Presidential campaign to silence claims of an extramarital encounter. The prosecutor who obtained the Grand Jury indictment was Democrat Manhattan District Attorney Alvin Bragg, who campaigned promising to indict Trump.⁴ The indictment was obtained from a Grand Jury drawn from Manhattan, where, in 2020, Biden took 84.5 percent of the vote against Trump's 14.5 percent.⁵

2. On November 18, 2022, Attorney General Garland appointed Jack Smith as Special Counsel to investigate "efforts to interfere with the lawful transfer of power following the 2020 presidential election or the certification of the Electoral College vote" as well as the unprecedented August 8, 2022 subpoena executed at Mar-a-Lago relating to classified documents.⁶ Almost seven months after his appointment, on June 8, 2023, Smith obtained an

⁴ B. York, "For prosecutor Bragg, Trump indictment is campaign promise kept," *Washington Examiner* (Apr. 4, 2023).

⁵ E. Geringer-Sameth, "Breaking Down Final 2020 Vote Tallies Across New York City," *Gotham Gazette* (Dec. 4, 2020).

⁶ Off. of the Att'y Gen., Order No. 5559-2022 (Nov. 18, 2022).

unprecedented indictment of former President Trump in the Southern District of Florida with respect to his handling of Presidential and classified records.⁷

3. On August 1, 2023, Smith obtained his second federal indictment of Trump in the District of Columbia for crimes allegedly committed between the November 3, 2020 Presidential election and the January 20, 2021 Presidential inauguration. *See* Sections II and III, *infra*.

4. On August 14, 2023, Trump was indicted for the fourth time, for various charges relating to alleged 2020 election interference in Georgia, including violating the state's RICO law. The investigation and prosecution of Trump in Fulton County was undertaken in violation of the Georgia statute requiring prior approval by the bipartisan Georgia State Election Board. O.C.G.A. section 21-2-31(5). The indictment was obtained by Democrat Fulton County District Attorney Fani Willis from a grand jury drawn from Fulton County where Biden had won 72.6

⁷ Similarly, Special Counsel Robert Hur, was appointed by Attorney General Garland, to investigate Joe Biden's handling of classified documents. Off. of the Att'y Gen. Order. No. 5588-2023 (Jan. 12, 2023). Hur discovered that, while a Senator and Vice President, without the unilateral authority to classify and declassify documents possessed by a President, Biden removed classified documents out of secured areas, took them home, left them unsecured at various locations, and then shared them with a ghostwriter working with him on a book for which Biden accepted an \$8 million advance. *See Report of the Special Counsel Robert K. Hur* (Feb. 2024) at 141. Nevertheless, Hur recommended against bringing charges against Biden.

percent of the vote against Trump's 26.2 percent.⁸ After the grand jury report was finalized, the Foreperson of the Special Grand Jury embarked on a media tour discussing aspects of secret grand jury proceedings.⁹

In 2022, Willis appointed Nathan Wade as special prosecutor. Before Trump was indicted, Wade attended two meetings in 2022 with White House personnel for which he billed Fulton County.¹⁰ On March 15, 2023, Fulton County Judge Scott McAfee ruled that Willis' "romantic" relationship with Wade created the appearance of a conflict of interest, requiring either Willis or Wade leave the case, but not both. At that point, Wade resigned.¹¹

⁸ "Joe Biden won in Georgia, flipping a state Donald Trump won in 2016," *Politico* (Jan. 6, 2021).

⁹ See L. Bruggeman, "By speaking out, could foreperson in Georgia Trump probe undermine a future case?" *ABC News* (Feb. 22, 2023).

¹⁰ See J. Bickerton, "Fani Willis' Prosecutor Meeting White House Counsel Raises Questions," *Newsweek* (Jan. 9, 2024) ("The first, on May 23, 2022, is labeled 'travel to Athens: Conf[erence] with White House Counsel,' for which Wade charged \$2,000 for eight hours' work. The bill read that Wade also had an 'interview with DC/White House' on November 18, 2022 for which he also billed \$8,000 at a rate of \$250 per hour.").

¹¹ *Georgia v. Trump*, Order on Defendants' Motion to Dismiss and Disqualify (Mar. 15, 2024).

B. Course of Proceedings.

On December 7, 2023, the district court ruled that former Presidents enjoy no immunity from criminal prosecution for official acts, and a federal prosecutor may bring criminal charges against a former President based on conduct for which he was acquitted during an impeachment proceeding. *United States v. Trump*, 2023 U.S. Dist. LEXIS 215162 (Dec. 1, 2023). The district court stayed proceedings during the pendency of Trump’s appeal to the D.C. Circuit. *See* Dist. Ct. doc.# 186 (Dec. 13, 2023).

Special Counsel Jack Smith then “filed a petition for certiorari before judgment and a motion to expedite in this Court,” which this Court denied. *Id.* On February 6, 2024, the D.C. Circuit affirmed the district court. *United States v. Trump*, 2024 U.S. App. LEXIS 2714 (D.C. Cir. 2024). On February 12, 2024, Trump filed an application to stay the D.C. Circuit’s mandate pending disposition of his petition for certiorari, which this Court treated as a petition and granted. The Court declined to consider the legality of the Attorney General’s appointment of Jack Smith at this time.

STATEMENT

This Court is now addressing:

Whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office.

It is significant that in the nation's 236th year since ratification of the Constitution, and after 46 Presidents of the United States, the nation has never confronted the problem presented by this Court's question because no former President of the United States has ever been indicted for a crime. Although the question presented is stated in terms of "presidential immunity," the question for the nation is:

Whether America will join the ranks of countries where those wielding governmental authority abuse power to imprison their political opponents.

The prosecution of President Trump by the Biden Administration has a parallel to a recent event in Communist China. The President of China from March 2003 to March 2013 was Hu Jintao. On October 22, 2022, the world watched as former President Hu Jintao, was escorted off the stage at the closing ceremony of the Chinese Communist Party National Congress at the Great Hall of the People in Beijing. Hu had been sitting next to President Xi, when pulled from his seat and escorted out of the hall by two credentialed men. The Chinese official media reported that Hu was not feeling well.¹² However, *Foreign Policy* interpreted the incident as political, suggesting that it could have been Xi's intention to

¹² S. McDonnell, "Hu Jintao: The mysterious exit of China's former leader from party congress," *BBC* (Oct. 22, 2022).

“deliberately and publicly humiliate his predecessor.”¹³ With Xi beginning his third five-year term, and Hu being 81 years old, there was no need to or indication of Hu being jailed, and he has since made one public appearance.

China is not unique. An opponent of the Russian government, Alexei Navalny, who was jailed in 2021 when he returned to Russia from Germany, claimed that his arrest was politically motivated. While he was a minor political figure in Russia, his recent death while in a Russian prison has resulted in renewed criticism of the Russian government for jailing its political opponents.¹⁴

During the second 2016 presidential debate, candidate Trump was widely criticized for saying that

¹³ J. Palmer, “What the Hell Just Happened to Hu Jintao?” *Foreign Policy* (Oct. 22, 2022).

¹⁴ Arrests of political opponents is a staple of world politics. Nelson Mandela was incarcerated for over two decades for opposing the government, but eventually was released and elected President of South Africa in 1994. Brazil’s President Lula da Silva was jailed four years ago on corruption charges, and then defeated President Jair Bolsonaro. Zimbabwean President Robert Mugabe ordered the arrest of opposition leader Morgan Tsvangirai before the results of the 2008 election were known. Pakistan’s former Prime Minister Imran Khan, the leading opposition figure in the country, was arrested and sentenced to a three-year jail sentence for corruption last August. Even journalist critics are not immune, as Chilean-American YouTuber Gonzalo Lira, was arrested for criticizing the Zelensky government in Ukraine, then was reportedly tortured, dying in a Ukrainian jail in January 2024.

if elected he would instruct his attorney general to investigate Hillary Clinton’s use of a personal email account while Secretary of State. A liberal website declared that Trump had crossed a line: “Say what you will about whether the United States is a true democracy, the threat of jailing a political opponent is still not something done in a democratic system.”¹⁵ Former Attorney General Eric Holder agreed, tweeting, “In the USA we do not threaten to jail political opponents. [Trump] said he would. He is promising to abuse the power of the office.” However, when the President being jailed is Trump, even a former Attorney General’s legal view can be subordinated to the need to have his party retain power, as Holder demonstrated when he changed his tune: “given what we have learned, I think that he probably has to be held accountable.”¹⁶ Therefore, while Trump rallied supporters by merely saying “Lock her up,” Biden is rallying his supporters by actually working hard to lock Trump up.

In resolving the issue of presidential immunity, this Court will determine in no small part whether our nation will continue to function as a constitutional republic or will empower those in office to even further politicize criminal justice, using it to clear the field of

¹⁵ See C. Daileda, “These are the dictators who throw opponents in jail — or worse,” *Mashable* (Oct. 10, 2016).

¹⁶ T. Porter, “Obama attorney general Eric Holder says the DOJ should indict Trump over the Capitol riot,” *Business Insider* (May 9, 2022).

their political rivals, exercising a power heretofore thought to be the defining attribute of tyrants.

SUMMARY OF ARGUMENT

The question presented has never before been resolved because until 2023, no prosecutors have ever been so partisan and reckless as to bring charges against a President for actions taken during his Presidency. The Constitution implies that criminal charges can only follow House impeachment and Senate conviction. Presidential immunity does not put the President “above the law” any more than the “Speech and Debate” clause, which confers criminal immunity, puts Congress “above the law.” As Chief Justice Marshall made clear, a President is vested with discretion, and “is accountable only to his country in his political character, and to his own conscience.” Failure to provide Presidential immunity will transfer electoral power from voters to lawyers, juries, and judges, gravely damaging public belief in the rule of law. Tyrants abuse their power to clear the field of political opponents, but this Court must not allow America to become that kind of nation.

The Special Counsel was appointed only after President Trump announced as a candidate for President against President Biden. The D.C. prosecution, brought more than two and one-half years after January 6, 2021, reveals the danger of empowering lawyers to take down opposition leaders. Novel and creative legal theories were developed by the Special Counsel designed to criminalize the right of the President to challenge whether elections are

conducted properly and votes are counted accurately. Trump has been indicted for making phone calls, speeches, and Tweeting. Challenging an election is exactly what several of Trump's predecessors have done since the nation's Founding.

Vice President Pence's Counsel gave legal advice that there was legal and historical support for the Vice President taking a "prominent" role — perhaps a "decisive role in resolving objections" on January 6. Although Pence declined to take such a role, he described the election as having "significant allegations of voting irregularities and numerous instances of officials setting aside election law." He believed Americans "have every right" to demand "a full investigation of electoral misconduct." Nevertheless, President Trump has been indicted for exercising that right.

ARGUMENT

I. PRESIDENTIAL IMMUNITY FROM CRIMINAL CHARGES IS CONSISTENT WITH BOTH HISTORY AND SEVERAL CONSTITUTIONAL PRINCIPLES.

A. History and Tradition.

Presidential immunity has existed *de facto* for the history of the nation. Warren Harding was never indicted for the Teapot Dome scandal. Ulysses Grant was not indicted for the Whiskey Ring conspiracy. Richard Nixon was pardoned by President Ford. Ronald Reagan was not indicted for Iran-Contra. Bill

Clinton lied in a deposition in a sexual harassment lawsuit, but reached a civil arrangement with special counsel Robert Ray. Indictment of George W. Bush was discussed for war crimes, but primarily in other countries. In several of these situations, Presidential aides have been prosecuted, but not Presidents.¹⁷ Until 2023 and the explosion of lawfare, whereby lawyers and many judges act to override the will of voters, no federal or state prosecutor has opened this Pandora's box.

B. The Impeachment Power.

The government's repeated incantation that affording a President criminal immunity would violate the rule that "no person is above the law" may be good political punditry, but it is hyperbolic and inaccurate.¹⁸ To be sure, the Constitution does not expressly provide for presidential immunity, but it provides an avenue for the criminal indictment of a President:

When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present. Judgment in Cases of Impeachment shall not extend further than to removal from

¹⁷ See, e.g., A. Fins, "Have other former U.S. presidents been indicted?" *Palm Beach Daily News* (Mar. 30, 2023).

¹⁸ T. Axelrod & L. Barr, "AG Garland reiterates 'no person' — not even Trump — is above the law over Jan. 6." *ABC News* (July 20, 2022).

Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but **the Party convicted** shall nevertheless be liable and **subject to Indictment, Trial, Judgment and Punishment**, according to Law. [Article I, Sec. 3, cl. 6 and 7 (emphasis added).]

Since the Constitution specifies that a President who is convicted in an impeachment trial is “subject to” criminal prosecution, that strongly suggests that a President who is acquitted is not. Those who hoped that a conviction at Trump’s second impeachment trial for activities primarily relating to January 6, 2021 would open the door to criminal prosecution of Trump were disappointed as that effort failed.

C. Speech and Debate Clause.

The immunity President Trump argues for parallels almost exactly that provided to the entire legislative branch under the Speech and Debate Clause: “for any Speech or Debate in either House, they shall not be questioned in any other Place.” Article I, Sec. 6, cl. 1.

This Court has made clear that it confers criminal immunity: “the Speech or Debate Clause at the very least protects [members of Congress] from **criminal** or civil liability.... It thus protects Members against **prosecutions that directly impinge upon or threaten the legislative process.**” *Gravel v. United States*, 408 U.S. 606, 615-616 (1972) (emphasis added). *See also United States v. Helstoski*, 442 U.S. 477, 491

(1979). So too here, Presidential immunity serves to protect a President's exercise of discretion in carrying out the responsibilities of the executive power of the government without concern from political opponents, state or federal:

[t]he threat of future criminal prosecution by a politically opposed Administration will overshadow every future President's official acts — especially the most politically controversial decisions. The President's political opponents will seek to influence and control his or her decisions via effective extortion or blackmail with the threat, explicit or implicit, of indictment by a future, hostile Administration, for acts that do not warrant any such prosecution. This threat will hang like a millstone around every future President's neck, distorting Presidential decisionmaking, undermining the President's independence.... [Application for Stay ("App.") at 2.]

D. Separation of Powers.

The Constitution vests in a single person, the President, the "executive power" of the United States as well as the responsibility to "take care that the laws be faithfully executed." Necessarily, the Constitution vests the presidency with a large degree of discretion, and presidential immunity protects the President's exercise of that discretion. Allowing a President to be indicted would violate Chief Justice Marshall's assertion that "[b]y the constitution of the United

States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and **is accountable only to his country in his political character, and to his own conscience**.... [T]he decision of the executive is conclusive.” *Marbury v. Madison*, 5 U.S. 137, 165-166 (1803) (emphasis added).

Although courts can review the legality of a President’s actions, allowing a President to be indicted necessarily puts him personally under the authority of a court, and “[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.” *Id.* at 170. *See also Morrison v. Olson*, 487 U.S. 654, 689-690 (1988). When the President “exercises an authority confided to him by law,” his official conduct cannot “be passed upon by a jury” or “upon the proofs submitted to a jury.” *Martin v. Mott*, 25 U.S. 19, 32-33 (1827).

E. Damage to the Rule of Law from Political Prosecutions.

The American People are fully aware of what is at stake in this litigation. This case could determine whether indictments obtained in Democrat districts by Democrat prosecutors will deprive the American People of the right to vote for a man who may now be the leading candidate for President of the United States. Down the road, it could determine if

Republican prosecutors in Republican districts do the same. It will determine if lawyers, juries, and judges will determine the future of the nation, not voters. A recent opinion piece by the Deputy Editorial Page Editor of the *Wall Street Journal* explains:

The newest buzzword in our politics is **lawfare**, or using the legal system as a **weapon against a political opponent**. It sits before us now as a spectacle of political gluttony. How many lawsuits, court motions and judgments against Donald Trump can the Democratic Party chow down? More disturbing is the high price the American system may pay for this excess.... The argument on behalf of this really quite unprecedented legal offensive boils down to ... [n]o one is above the law.... My single-sentence reply is that the Democrats' **use of lawfare on this scale makes it likely that respect for the law will decline, and dangerously so**, among much of the American public.... [T]he American left never knows when to stop, so it is waging the get-Trump legal assault on every imaginable front.... [D. Henninger, "The High Price of Democrats' Anti-Trump Lawfare," *Wall Street Journal* (Mar. 14, 2024) (emphasis added).]

Both Biden and Trump have recently been confirmed as the Democrat and Republican nominees for President in the November 2024 election. Polling shows that these two candidates are about evenly matched nationally, eight months before the November

5, 2024 election, and Trump is ahead in all seven battleground states.¹⁹ Although thus far the indictments against Trump have appeared only to solidify his support, the effect of a conviction may be very different and could determine the outcome of the election, particularly since President Biden’s approval rating recently sank to a new low, at 37.4 percent.²⁰ Thus, all prosecutors of Trump — Democrats or appointed by Democrats — are politically incentivized to do something other than obtain justice.

President Trump’s specific actions as alleged in the indictments were well within his discretionary responsibilities. *See* App. at 18-19. To deny immunity to President Trump under these circumstances would have far more serious consequences than any repercussions to Trump himself. It would literally criminalize the President’s constitutional obligation to “take care that the laws be faithfully executed,” and be replaced by the views of the next President and the judicial branches, rendering performance of his constitutional obligations essentially impossible.

All opinions for or against President Trump aside, the question presented is much larger than one President. This a perfect case to employ the “shoe on the other foot” test, as exactly that may happen not too far in the future. The best way for this Court to

¹⁹ RealClearPolling, [2024 General Election: Trump vs. Biden](#) (visited Mar. 17, 2024).

²⁰ E. Palmer, [“Joe Biden’s Approval Rating Falls to All-Time Low After SOTU,”](#) *Newsweek* (Mar. 13, 2024).

address this issue would be as it recently did in *Trump v. Anderson* — unanimously — which these *amici* respectfully request this Court again to do.

II. ALLOWING FORMER PRESIDENTS TO BE CHARGED CRIMINALLY INCENTIVIZES POLITICIZED PROSECUTORS TO DEVELOP AND DEPLOY NOVEL AND SPECIOUS LEGAL THEORIES.

The charges brought against President Trump in the District of Columbia all relate to his challenging election results in those states which swung the election to President Biden. In those states, there were last-minute election law changes made not by state legislatures expressly entrusted with that responsibility by Article I, Sec. 4,²¹ but rather as a result of lawfare waged intensely by Democrat lawyers.²² See App. at 4. In addition, evidence of

²¹ This was a serious legal issue, illustrated by the Pennsylvania Supreme Court requiring the counting of mail-in ballots received three days after Election Day, overriding state law which established an Election Day deadline. Justice Alito stated: “there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution.” See, e.g., *Republican Party v. Boockvar*, 141 S. Ct. 1, 2 (2020) (Alito, J., concurring). Only after the D.C. indictment, this Court decided *Moore v. Harper*, 600 U.S. 1 (2023), ruling that the federal elections clause does not vest exclusive authority in state legislatures.

²² E. Tucker, “Biden assembles legal team ahead of potential court challenges after 2020 election,” *AP* (Sept. 14, 2020).

specific election fraud was widespread.²³ While victorious candidates would always prefer that their opponent concede the race, the right of a candidate to challenge the initial returns of an election had, until now, not been criminalized.

A. Jack Smith Created a Novel and Bogus Legal Theory.

A well known political saying attributed to a Soviet official during the Stalinist era is “Show me the man and I’ll show you the crime.” Federal prosecutors have several thousand crimes that they can charge.²⁴ Retired Judge Richard Posner explained:

The machinery of federal criminal investigation and prosecution, with its grand juries, wiretaps ... broad definition of conspiracy, heavy sentences (the threat of which can be and is used to turn criminals into informants against their accomplices), and army of FBI agents, is very powerful; there is a fear that fed enough time and money, **it can nail anybody**. [R. Posner, An Affair of State at 87 (Harvard Univ. Press: 1999) (emphasis added).]

²³ See, e.g., J. Solomon, “Bombshells undercut the ‘Big Lie:’ 21 confirmed illegalities, irregularities from 2020 election,” *Just the News* (July 16, 2022); “Heritage Election Fraud Database,” *Heritage Foundation*.

²⁴ See ABA Criminal Justice Section, The Federalization of Criminal Law (1998) (Edwin Meese III, Chairman).

Those in power always seem able to find lawyers who will do their bidding, even if it violates the admonition of Attorney-General Robert Jackson:

“The prosecutor,” he said, “has more control over life, liberty, and reputation than any other person in America....” He pointed out the tremendous discretion that is held by the prosecutor in the ability to decide whether to investigate, order arrests, seek an indictment by a grand jury, present a case for trial or dismiss it.... “[When] the prosecutor ... acts from malice or other base motives, he is one of the worst.” [Edwin Meese, “Robert H. Jackson, Public Servant,” 68 ALBANY L. REV. 777, 779 (2005).]

Jack Smith has previously tried to develop new legal theories to punish conservatives involved in elections. He was involved in the effort by Lois Lerner to have the IRS target conservative nonprofit organizations. Smith sent “an email ... to one of his deputies, Richard Pilger, [which] reads: ‘Could we ever charge a 371 conspiracy to violate laws of the USA for misuse of such non profits to get around existing campaign finance laws + limits?’” An article concludes that “Smith was looking for a novel legal approach to bring a conspiracy case against conservatives.”²⁵

On August 1, 2023, Special Counsel Jack Smith persuaded a grand jury in the District of Columbia to

²⁵ J. Sekulow, “Special Counsel Jack Smith Involved in Major IRS Scandal,” *ACLJ* (Aug. 11, 2023).

return a four-count indictment relating to events occurring between election day on November 3, 2020 and inauguration day on January 20, 2021. Everything about this indictment was political. First, the indictment was returned in August 2023, more than two years and seven months after the end of the period during which President Trump supposedly committed the crimes charged. By the time Trump was indicted, over 1,000 January 6 protesters had been charged.²⁶ Second, **no indictment was sought until after President Trump filed with the Federal Election Commission as a candidate** on November 15, 2022. Three days later, on November 18, 2022, Attorney General Merrick Garland appointed Jack Smith to “conduct the ongoing investigation into whether any person or entity violated the law in connection with efforts to interfere with the lawful transfer of power following the 2020 presidential election....” See Attorney General Garland, “Appointment of John L. Smith as Special Counsel” (Nov. 18, 2022). Smith took over eight months to indict the former President, at which point the nation was closer to the 2024 Presidential election than to the 2020 Presidential election.

B. The Legal Theory of the D.C. Indictment.

The first count of the indictment was for conspiracy to defraud the United States in violation of 18 U.S.C. § 371. See Indictment (Doc#1), ¶ 6. Curiously, there was no charge of violating the

²⁶ See Capitol Hill Siege Legal Tracker (last updated Nov. 1, 2023), *George Washington Program on Extremism*.

underlying statute, *i.e.*, actually defrauding the United States. This charge was based on Trump’s effort to provide an opportunity for state legislatures to evaluate election irregularities in their state and select a different slate of Presidential Electors where necessary to effect the will of the voters. *See id.* ¶ 10. The indictment treats Trump’s effort as though it was a unique, corrupt, and illegal action. None of those implications are true. In 1876, there were competing sets of electors in the Rutherford B. Hayes election.²⁷ In 1961, then-Vice President Nixon was presented with two sets of electors from Hawaii, and acted unilaterally to recognize the slate supporting President Kennedy, not himself. *See* Jacob letter to Pence at 2, discussed in Section III, *infra*. No one was indicted then.

The second and third counts are related and are based on allegations that President Trump interfered with the January 6, 2021 joint session of Congress in violation of 18 U.S.C. § 1512(c)(2) and (k). *See* Indictment ¶¶ 126, 128. The legitimacy of this novel use of Sarbanes-Oxley is now before this Court on the merits in *Fischer v. United States*.²⁸

The fourth count was for conspiracy to deprive voters of their right to vote in violation of 18 U.S.C.

²⁷ S. Blackford, “Disputed Election of 1876,” *Miller Center*.

²⁸ *See generally* Brief of Amici Curiae America’s Future on Petition, Supreme Court No. 23-5572 (Oct. 13, 2023); Brief of Amici Curiae America’s Future on Merits, Supreme Court No. 23-5572 (Feb. 5, 2024).

§ 241. *See* Indictment at ¶ 130. Here again, this conspiracy charge was brought without a charge based on the underlying crime. The theory underlying this count appears to be that President Trump’s efforts to have officials investigate and take appropriate action with respect to Presidential election improprieties was necessarily a corrupt action.

The Indictment contains references to Trump’s promotion of and his failure to control the Capitol Hill riot, but these were only political coloring, untethered to any charge, such as for insurrection under 18 U.S.C. § 2383. *See, e.g.*, “Before [Trump] had finished speaking, a crowd began to gather at the Capitol. Thereafter, a mass of people — including individuals who had traveled to Washington and to the Capitol at [Trump’s] direction — broke through barriers cordoning off the Capitol grounds and advanced on the building...” ¶ 107 (emphasis added); *see also* ¶¶ 104-105, ¶ 108, ¶ 110, ¶¶ 111-112, ¶ 114. Since the indictment, Trump’s claim to have offered 10,000 National Guard troops has been validated, and the claim that he grabbed the steering wheel of “the Beast” has been shown to be bogus.²⁹

C. The Factual Predicate for the D.C. Indictment.

Counts two and three assert a conspiracy and actual interference with the January 6 joint session of Congress by making **phone calls, speeches, and**

²⁹ *See* J. Turley, “Report: Trump Did Propose 10,000 National Guard Troops on January 6th” (Mar. 12, 2024).

even Tweeting to urge that the states' electoral votes went to the candidate who received the most votes in the state, including: calling the Speaker of the Arizona House (§ 15) and Georgia Attorney General (§ 24); having a meeting with two Michigan legislature leaders (§ 35); Tweeting about the Pennsylvania General Assembly (§ 44) and Tweeting about a Wisconsin Supreme Court decision (§§ 49-50).

President Trump may be the only January 6 defendant who never went near the Capitol that day. It appears clear that the charges against President Trump are based on his statements — *i.e.*, speech. Until Jack Smith fashioned his theory, all such Presidential communications would be viewed as consistent with (a) a presidential candidate and/or (b) a chief executive seeking to avoid the selection of a person not validly elected.³⁰ All of the factual allegations in support of counts two and three would have been protected by the First Amendment if President Trump had been only a private citizen at the time. However, the President had a duty to do what he did. The fact that President Trump was the President of the United States at the time means that he possessed all of the Executive Power of the federal government to do what he could to ensure that the

³⁰ Had Jack Smith's novel interpretation of § 1512 been in effect after the 2016 election, it could have been used to indict Hillary Clinton, but the Trump Department of Justice never indicted Clinton for, *inter alia*, promoting the discredited conspiracy theory that Russia had influenced our election, which was used to interrupt and delay the January 6, 2017 vote certification. See B. Williams, "11 times VP Biden was interrupted during Trump's electoral vote certification," *CNN* (Jan. 6, 2017).

election results were fair. The fact that he was a candidate may have complicated his responsibility and made it easier for his political opponents to claim he was operating only in his self-interest, but he was also acting to protect the votes of those who voted for his candidacy.

President Trump believed that the Vice President, as President of the Senate, had a degree of discretionary power when objections were raised during the counting of the electoral votes to adjourn the joint session to get the informed judgment of state legislatures of the contested states. Congress apparently did not view that as a fraudulent legal theory, as it rushed to amend the Electoral Count Act on December 29, 2022, before Democrats lost control of the House, to describe the role of the Vice President as “Ministerial in nature” with “no power to solely determine, accept, reject, or otherwise adjudicate or resolve disputes over the proper certificate of ascertainment of appointment of electors, the validity of electors, or the votes of electors. 3 U.S.C. § 15(b). This made the Act more consistent with Smith’s Indictment, which repeatedly asserts the Vice President’s role was “ceremonial” only. Indictment at ¶¶ 8.b., 10.d, 86, 90.

III. THE D.C. INDICTMENT CRIMINALIZES TRUMP'S LAWFUL EFFORT TO URGE PENCE TO CARRY OUT HIS CONSTITUTIONAL AND STATUTORY DUTIES.

The Indictment brought in the District of Columbia characterizes President Trump's actions as designed "to pressure the Vice President to fraudulently alter the election results." Indictment ¶ 86; *see also* ¶¶ 10.d; 90; 102; 103; 104. If "pressuring" an elected official to take a particular position is now to be made a crime, the courts will be very busy indeed.

The Indictment portrays Pence as a weak man, bereft of legal counsel, whom Trump was coercing to do what Pence believed to be wrong. None of these impressions are true. Pence was the second highest-ranking person in the United States Government. Pence had official legal counsel, Gregory Jacob, who the prior month advised him that there was sound legal and historical authority for him to decide electoral disputes — a power which he chose not to exercise. And on January 6, Pence stated that there had been both election fraud and judicially changed election laws altering the election outcome. Thus, the core of Jack Smith's Indictment was based on a legal theory inconsistent with the contemporaneous public writings of Vice President Pence and the legal advice offered by his Counsel.

A. The Indictment Conflicts with Vice President Counsel Gregory Jacob's Advice Concerning the Vice President's Role.

On December 8, 2020, in his capacity as Counsel to the Vice President, Gregory Jacob wrote a Memorandum for Pence on the "January 6 Process for Electoral Vote Count" which states:

it is clear that the sitting Vice President plays a **prominent role in the counting** of electoral votes, **including resolving objections** to those votes. There is **disagreement**, however, whether the text of the Twelfth Amendment privileges the Vice President to play a **decisive role in resolving objections** to electoral votes on their merits, or whether (pursuant to the Electoral Count Act) the role of the Vice President in resolving dispute is largely **ministerial**. [Jacob Memo at 1 (emphasis added).]

The Jacob Memorandum further described this legal disagreement, indicating that the better argument based on history is that the Vice President had authority to resolve questions about the validity of electoral votes:

Some scholars argue that under the text of the Twelfth Amendment, it is the sole responsibility of the Vice President to count electoral votes, and that it is accordingly also

the Vice President's **sole responsibility to determine whether or not disputed electoral votes should be counted**. There is some historical evidence that [**Vice President**] **Adams** and [**Vice President**] **Jefferson** both **resolved issues over the validity** of electoral votes in their own favor, and in 1857 the President of the Senate ... **John Crittenden** [when the Vice Presidency was vacant] personally **overruled an objection** to the counting of Wisconsin's electoral votes, and asserted that it was his responsibility to make the validity determination in the first instance.... [*Id.* at 2 (emphasis added).]

The Jacob Memorandum then addressed the interplay of the Twelfth Amendment and the Electoral Count Act of 1887, indicating that:

[S]cholars have argued that the Electoral Count Act's dispute resolution mechanism is **unconstitutional because it relegates the Vice President ... to a purely ministerial role** in resolving such disputes.... [I]n 1961, when **Vice President Nixon** magnanimously **resolved** against himself a **dispute** over three competing slates of electors that had been submitted by the State of Hawaii. [*Id.* at 2 (emphasis added).]

Pence Counsel Jacob then describes the process to be followed when proper objections are filed, in writing, sponsored by both a member of the House and

a member of the Senate, challenging the disputed votes which were certified by the State's Executive, if they "were not 'regularly given'" which Jacob describes as a phrase laden with ambiguity:

Following up to two hours of debate, **the House and the Senate may "concurrently ... reject the vote** or votes when they agree that such vote or votes have **not been so regularly given** by electors whose appointment has been so certified." 3 U.S.C. § 15. [*Id.* at 2 (emphasis added).]

From the Jacob Memorandum, we now know that Vice President Pence was advised by his Counsel of the following:

1. Under the Twelfth Amendment, the Vice President "plays a prominent role in the counting of electoral votes, including resolving objections";
2. That some scholars believe that, under the Twelfth Amendment, the Vice President has the "sole responsibility to determine whether or not disputed electoral votes should be counted";
3. That Vice President Adams, Vice President Jefferson, and President of the Senate John Crittenden (when the Vice Presidency was vacant) "resolved issues over the validity of electoral votes";
4. That scholars have stated that the Electoral Count Act's dispute resolution mechanism "is unconstitutional because it relegates the Vice President ... to a purely ministerial role"; and

5. That even after enactment of the Electoral Count Act, Vice President Nixon “resolved ... a dispute over three competing slates of electors.”³¹

The Indictment brought against President Trump by Jack Smith is predicated on a theory that is diametrically opposite to that presented by Vice President Counsel Jacob in December.

The Indictment describes the Vice President’s role as “ceremonial,” not “prominent.” Indictment ¶¶ 8.b; 10.d; 86; 90; and 96. It never references the Vice President’s duties under the Twelfth Amendment. The Indictment describes the process of the Electoral Count Act, never even mentioning that many believe that Act violates the Twelfth Amendment. It never mentions the historic instances involving Vice Presidents Adams, Jefferson, Nixon, and President of the Senate Crittenden.

The margin of Trump’s supposed defeat in several of the seven states cited in the Indictment was tiny — under 12,000 votes in Arizona and Georgia. ¶ 65. Jack Smith’s Indictment takes the position that Trump’s effort to avail himself of his constitutional right under the Twelfth Amendment and statutory right under the Electoral Count Act are criminal acts. Even the Electoral Count Act anticipates the existence of competing slates of electors, but the Indictment

³¹ Another memorandum from Jacob to Pence, apparently written to support the position that Pence had decided to take, was completed hours before Joint Session commenced on January 5, 2021.

charges that efforts to assemble electors as required by that Act to challenge those appointed by Governors to be a fraudulent act. To the best information of these *amici*, this is the first time in American history that such a radical claim has been advanced.

B. The Indictment Conflicts with Vice President Pence’s January 6 Public Assertion that There Were Election Irregularities.

On the morning of January 6, 2021, Vice President Pence issued a Dear Colleague letter with respect to the Joint Session of Congress to be held that day. He began with a recognition of election irregularities:

After an election with significant allegations of voting irregularities and numerous instances of officials setting aside state election law, I share the concerns of millions of Americans about the integrity of this election. The American people choose the American President, and have every right under law to demand free and fair elections and a full investigation of electoral misconduct. [Vice President Pence Dear Colleague Letter (Jan. 6, 2021) at 1 (emphasis added).]

The Indictment against President Trump is predicated on an opposite set of facts from what the Vice President asserted. Whereas Pence believed there were “significant allegations of voting irregularities,” the Indictment describes all such charges as

fraudulent. Whereas Pence believed that there were “numerous instances of officials setting aside state election law,” the Indictment is predicated on the notion that there were no irregularities.

Pence’s letter then stated:

As presiding officer, I will do my duty to ensure that these concerns receive a fair and open hearing in the Congress of the United States. **Objections will be heard**, evidence will be presented, and **the elected representatives** of the American people **will make their decision**. [*Id.* (emphasis added).]

With the release of this letter, the American People learned for the first time that Pence would reject the practice of Vice Presidents Adams, Jefferson, Nixon, and Senator Crittenden and the considered views of many scholars, as well as the urgings of President Trump. Rather, Pence would assume the Electoral Count Act was constitutional and believe it gave him no leeway to ensure the electoral votes being counted were accurate. However, he did acknowledge Congress would decide electoral challenges:

Some believe that as Vice President, I should be able to accept or reject electoral votes unilaterally. Others believe that electoral votes should never be challenged in a Joint Session of Congress.... I believe neither view is correct.... When disputes concerning a presidential election arise, under Federal law, it is the people’s representatives who review

the evidence and resolve disputes through a democratic process. [*Id.*]

Pence ignored the precedents offered him in his Counsel's memorandum, incorrectly asserting "no Vice President in American history has ever asserted ... authority [to decide which electoral votes should be counted]." *Id.* at 2. For his legal authority on this momentous issue, Pence then relied not on a law review article or even a journal article, but on a Tweet³² penned the night before by former Judge J. Michael Luttig, at the request of Pence's private counsel, Richard Cullen.³³ Luttig described his role as follows: "I was the one person in America who could come over the top of everybody concerned and give the vice president the support that he wanted and needed."

The Indictment stated that Trump "spread lies that there had been outcome-determinative fraud.... These claims were false, and the Defendant knew they were false." He is accused of an effort to "erode public faith in the administration of the election." ¶ 2. But even Pence shared concerns about the integrity of the election. Pence described "significant allegations of voting irregularities and numerous instances of officials setting aside state election law...." Nevertheless, the Indictment describes an effort to have the Vice President and Congress act on these irregularities as a "conspiracy to defraud the United

³² [Tweet by @judgeluttig](#) (Jan. 5, 2021).

³³ J. Gangel & J. Herb, [Anatomy of a Tweet](#), *CNN* (Feb. 20, 2022).

States,” a “conspiracy to corruptly obstruct and impede the January 6 congressional proceeding,” and a “conspiracy against the right to vote and to have one’s vote counted.” ¶ 4.

Trump is charged with urging the Justice Department to investigate election fraud, calling them “sham election crime investigations.” ¶ 10.c. But since the President has the duty to “take care” that the laws be enforced, Jack Smith tries to make Trump’s performing his official duties into a criminal act. The Indictment states that “senior leaders of the Justice Department ... told [Trump] on multiple occasions that various allegations of fraud were unsupported.” ¶ 11.b. Many of these lawyers were about to return to their positions in Big Law and had no desire to harm their careers by defending the interests of President Trump.

Election fraud is not easy to detect, especially in the days between an election and deadlines for challenges. U.S. District Judge Amy Totenberg explained: “[t]he stealth vote alteration or operational interference risks posed by malware that can be effectively invisible to detection, whether intentionally seeded or not, are high once implanted, if equipment and software systems are not properly protected, implemented, and audited.” *Curling v. Raffensperger*, 493 F. Supp. 3d 1264, 1341 (N.D. Ga. 2020). She concluded: “The Plaintiffs’ national cybersecurity experts convincingly present evidence that this is not a question of ‘might this actually ever happen?’ — but ‘when it will happen,’ especially if further protective measures are not taken.” *Id.* at 1342.

In an attempt to strengthen his case, Jack Smith filled the Indictment with conclusory assertions: “On December 14, the **legitimate** electors of all 50 states and the District of Columbia met...” (¶ 65), while “On the same day ... **fraudulent** electors convened **sham** proceedings ... to cast **fraudulent** electoral ballots.” ¶ 66. While in the final analysis, Pence chose not to exercise the authority that history showed he had under the Twelfth Amendment, his letter explained that he expected that those disputes would be handled by Congress under the Electoral Count Act.

Allowing Presidents to be charged criminally after they leave office leads to creative and unprecedented prosecutions constituting gross abuses of the justice system, that could be no better illustrated than by Jack Smith’s Indictment seeking to imprison President Trump for believing that the election was fraudulent and exercising his rights under the Constitution and statutes to investigate and challenge election results.

CONCLUSION

For the foregoing reasons, the President should be deemed immune from criminal prosecution for conduct involving official acts during his tenure in office.

Respectfully submitted,

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