No. 23-939

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *Petitioner*

v.

UNITED STATES OF AMERICA,
Respondent,

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

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BRIEF *of AMICUS CURIAE* CONDEMNED USA IN SUPPORTING OF PETITIONER

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Condemned USA is a Legal Advocacy Group, headed by Treniss Evans, which does not provide legal services but rather promotes public advocacy about legal issues. It fights to restore the freedom and unity of under-represented American families. It often works to help defendants locate attorneys. It is a united front of Americans dedicated to sharing the truth that leads to change. [1]

Condemned USA, and its founder and leader Treniss Evans, filed an *Amicus Curiae* brief in the Colorado Supreme Court, and the appeal therefrom to this Court.

Mr. Evans has been investigating and reporting events of January 6th since January 6th 2021. He was present at the Capitol on that day. Mr. Evans has served as a consultant & expert for numerous January 6th cases, including what have been the largest criminal trials related to January 6th.

Mr. Evans has been featured in numerous publications and recognized for his work. He has been interviewed over two hundred times, sought out for his expertise on the events of January 6th. He testified before the South Dakota state legislature.

Condemned USA delivered a white paper to

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made any monetary contribution intended to fund the preparation or submission of this brief.

the House Affairs Committee in the United States Congress: Weaponization FULL.pdf (hyperlink).

IV. INTRODUCTION

This brief is in support of former President Donald Trump.[2] The question presented is of profound significance that implicates the heart of the architecture of the U.S. Constitution.[3]

The Justices of this Court enjoy and require qualified immunity to be able to do their work. The Chief Executive, however, does not, according to the lower courts here and the Special Counsel.

Without at least qualified immunity, neither this Court nor the lower courts could function.[4] Likewise, military officers, sailors, soldiers, and

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[2] Trump's legal team asserts "absolute immunity," quoting from relevant precedent. But at present the dispute is being fought over the existence of any immunity at all.

[3] *See*, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (reasoning from architectural structure of Constitutional government).

[4] Precedents discussing "judicial immunity" involve two different situations, sometimes both: (a) immunity for a judge's official duties (b) Eleventh Amendment immunity contending that the plaintiff could not sue any State official whether a judge or not. For example,

> "Because we find the order denying immunity from damages is an appealable order, and that Walker is entitled to the protection of absolute judicial immunity from damages in this case, we reverse the district court, and order the dismissal of the damages action against him. Moreover, we dismiss all pendent state law claims on eleventh amendment grounds."

Holloway v. Walker, 765 F.2d 517 (5th Cir. 1985)

airmen must have the same immunity. The higher the level of a military officer – the more decision-making discretion he must undertake – the more important that immunity becomes.

If a President doesn't have immunity from prosecution for his actions, what prevents Georgia murder victim Laken Riley's family from suing Joe Biden for allowing her illegal migrant murderer into the USA? Or what if hundreds of families all sued, *seriatim*? Similarly, with no statute of limitations, former President Barack Obama could be prosecuted by some over-zealous prosecutor in the home state of U.S. citizens killed by drone strikes on Obama's orders overseas.[5] Tellingly, in the history of the nation prosecuting actions within a President's official authority has never been seriously considered.

Quite simply, *Amicus Curiae* urges this Court to seek as much as feasible one consistent principle of qualified immunity that shares the same substance and balancing of official acts or duties versus what the law calls a "frolic" into conduct outside of one's official duties. If possible, the most desirable result would be a unified principle. Less would contribute to public concerns and doubts of picking and choosing offices, officers, or office-holders. The issue should be de-personalized by trying to make it uniform.

The indictment here includes two (2) counts

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[5] Jere Van Dyk, "Who were the 4 U.S. citizens killed in drone strikes?" May 23, 2013, CBS News, https://www.cbsnews.com/news/who-were-the-4-us-citizens-killed-in-drone-strikes/

for violating 18 U.S.C. § 1512(c)(2), and 18 U.S.C. § 1512(k) for attempt, of corruptly obstructing, influencing, or impeding an official proceeding. The correct interpretation is pending before this Court on a grant of a writ of *certiorari* in *United States v. Joseph Fischer*, Record No. 23-5572, with oral argument set for April 16, 2024.

The indictment also includes a long, unstructured, and vague political narrative of a civil conspiracy under 18 U.S.C. § 371.

Furthermore, the indictment ends with a vague claim under 18 U.S.C. § 241 "to injure, oppress, threaten, and intimidate one or more persons in the free exercise and enjoyment of a right and privilege secured to them by the Constitution...."

However, it should be clearly noticed that the decision here may also affect other pending cases:

- *United States v. Trump, et al.*, Southern District of Florida, No. 23-80101 (classified documents case),
- *State of Georgia v. Trump, et al.*, Fulton County Superior Court, Georgia, 23-SC-188947 (a more detailed highly-structured version of the same allegations and counts here, with an emphasis on alternative electors).

V. SUMMARY OF THE ARGUMENT

First, the Special Counsel and courts below have erroneously argued whether a President is

immune from prosecution for actions taken ***WHILE*** President – that is during a period of time.

Trump's lawyers have argued that any President, not just himself, is immune from prosecution for acts taken ***AS*** President – that is the exercise of his duties as President, in keeping with the broad scope of his position. Trump's argument has nothing to do with the time period but with the nature of the acts, official or otherwise.

Second, Amicus contends that (a) qualified immunity inescapably exists, (b) that this necessarily highlights specific presidential actions and likely requires review on a case—by—case basis, but (c) President Trump can never be prosecuted, whether in office or out, for these actions which do constitute official acts.

Third, therefore, *the lower courts must analyze each and every one of* all the operative criminal allegations to consider which ones – assuming they can be valid at all – are official acts.

Most of the individual sub-allegations independently violate the First Amendment, *Brandenburg v. Ohio,* 395 U.S. 444 (1969),. and *NAACP v. Claiborne Hardware.*

Fourth, Amicus argues that the actions alleged are most or all – at least arguably – within any President's scope of official duties, including to make sure that the laws be faithfully executed with regard to elections, possible foreign

interference, and faithfulness to Article II, Section 1, of the U.S. Constitution.

Upon witnessing widespread refusal to investigate possible crimes and fraud, any President's duty comes sharply into focus. Claiming that we do not need to look because there would be nothing to find calls for the Constitutional chief law enforcement officer.

Upon hearing reports of foreign countries possibly hacking into voting machines, no President could responsibly or consistent with the faithful exercise of his duties fail to thoroughly investigate. Upon seeing massive resistance of and deflection from any actual investigation ("*We found nothing because we did not want to look*" the quip goes) any conscientious President's alarm would have to grow, demanding that the laws be faithfully carried out. Simply the refusal to investigate raises independent violations of law which the President ultimately supervises.

Quite obviously, it would be entirely without relevance what proper investigations might eventually turn up. A President's duty would be to conduct the inquiries, and to demand that subordinates comply and cooperate. These acts as official acts must be measured at the time they are made, not in the light of hindsight with facts not then yet known.

It is equally irrelevant if other people declare differing opinions. When most of the intelligence community told President Roosevelt "Japan is never going to attack Pearl Harbor" (because the

harbor is too shallow for torpedo bombers to succeed), he would still have to exercise his own best judgment regardless of varied opinions. The idea that a President must believe one side of an ongoing dispute is untenable.

Fifth, *Amicus* also argues and contends that many of the public statements by President Trump are public versions of his legitimate official actions within government channels, to keep the public informed of what is going on – officially.

Sixth, Department of Justice policy has always compelled Federal prosecutors to avoid bringing criminal prosecutions close to an election or in any way that might be perceived as embroiling the DOJ in election politics. This Court should ensure what the DOJ should have done and stay this case until it is no longer in danger of the public perception of having this Court elect the next President rather than the voters choosing.

ARGUMENT

A. SPECIAL COUNSEL ADDRESSES THE WRONG QUESTION

This controversy suffers from a tragic failure of the parties to join the same question, instead being like proverbial ships passing in the night.

- The Special Counsel opposes immunity for acts ***WHILE*** one is President.
- Trump argues immunity for acts taken

> ***AS*** President – that is within the scope of his official duties.

The Government and Trump are arguing inconsistent questions, in different universes.

The appropriate framing of the question is what conduct is within the job of President. This is very broadly defined because of the nature of the job. It is also largely defined by any incumbent President himself given the nature of Chief Executive of the Executive Branch.

In the Special Counsel's earlier Petition for review by this Court before judgment, the Petitioner began with the explanation of its focus:

QUESTION PRESENTED

> Whether a former President is absolutely immune from federal prosecution for crimes committed ***while*** in office or is constitutionally protected from federal prosecution when he has been impeached but not convicted before the criminal proceedings begin.

Government's Petition For A Writ Of Certiorari Before Judgment, Dec. 2023 *(emphasis added).*[6]

Yet Trump's original motion asserting

[6] https://www.supremecourt.gov/DocketPDF/23/23-624/292946/20231211144948077_U.S.%20v.%20Donald%20J.%20Trump%20--%20final%20final.pdf

presidential immunity described the question differently:

> "In view of the special nature of the President's constitutional office and functions," a current or former President has "absolute Presidential immunity from [civil] damages liability ***for acts within the 'outer perimeter' of his official responsibility."*** *Fitzgerald*, 457 U.S. at 756 (quoting *Barr*, 360 U.S. at 575). No court has addressed whether such Presidential immunity includes immunity from ***criminal prosecution for the President's official act***. The question remains a "'serious and unsettled question' of law." *See id.* at 743 (citation omitted) (holding "[i]n light of the special solicitude due to claims alleging ***a threatened breach of essential Presidential prerogatives under the separation of powers***," issues of Presidential immunity were "serious and unsettled"). In addressing this question, the Court should consider the Constitution's text, structure, and original meaning, historical practice, the Court's precedents and immunity doctrines, and considerations of public policy. *See id.* at 747.

[Donald Trump's] Motion To Dismiss Indictment Based On Presidential Immunity, *United States of America v. Donald J. Trump,* Case No. 1:23-cr-

(emphases added). [7]

Note also that Trump's attorneys consistently use the phrase "*acts within the 'outer perimeter' of his official responsibility.*" This does not mean acts that are dubious, improbable, or at the fringe. Trump's attorneys could have said acts "up to" the 'outer perimeter,' except that they were quoting from precedent. Everything within the outer perimeter of the President's authority is immune.

B. CORRECTLY STATING THE QUESTION RESOLVES THE ISSUES

Once the question is correctly stated, the answer appears clearly, immediately, and without difficulty. The Court of Appeals panel tripped over a mistaken concept of the case:

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[7] Since the issue is not a time period, it is possible for immunity to attach to actions after a President's term of office ends. For example, it is obligatory for an outgoing President to move out and vacate the White House residence and Oval Office and all offices so that the new President can move in. If a President were still doing that after 12:00 on January 20, perhaps while the new President were still speaking at the Capitol, that would still be part of the job regardless of when it was performed. If running out of time, the President tossed various items including documents into boxes – or rather directed General Services Administration staff to do so – that would be part of the job still left undone at Noon on January 20. If a year later or many years later a President were following the statutory process for sorting out Presidential documents with the National Archives and Record Administration, this would be a statutory requirement of the job of President, even after his term. As a consequence of having been President, the statute would impose rights and duties, for which she would be immune. If a new President commissioned a past President to represent the United States at the funeral of a foreign leader, would anyone think the past President was acting on his own as an individual? This issue is what, not when.

Can a President order Seal Team Six to assassinate a political opponent, the Panel asked? No. Do the official duties of a President include assassinating political opponents? No. So immunity does not apply.

Would it be part of a President's official duties to order Seal Team Six to rig the World Series so that the Boston Red Sox could win a pennant? No.

If a President stole a journalist's car, drove to a bar, got drunk, and then killed a pedestrian while driving drunk, his status as President would be irrelevant. The test is whether those acts are part of the job of being President. No.

Might courts sometimes need to resolve runaway sophistry? Yes. [8]

The correct legal analysis is a familiar one of the scope of an official's authority. To be sure, the most weighty and complex circumstances are involved, with duties arising under the U.S. Constitution concerning the executive leadership of the U.S. Government.

But the concepts are familiar. The only real complexity is that as the Chief Executive of the U.S. Government under the Constitution, a President has immense latitude and authority to define the scope of her own authority, because

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[8] The Constitution makes no mention of an Attorney General, a Department of Justice, Federal Bureau of Investigation, or federal prosecutors. The President is "it" as head of law enforcement.

deciding what priorities need to be focused on is part of a President's job and prerogative.

In the 2020 election we know many States' statutory rules pursuant to Article II, Section were violated.[9] Does the President's duty to "take care that the laws be faithfully executed" include the duty to ensure that election fraud does not occur? Yes.

However, it is also within the role of a President to evaluate and decide that a President ought to review the integrity of an election.

Whether anyone dislikes a President's decision to investigate the integrity of an election, *it is within his discretionary authority*.

That is, any President's discretion in carrying out her duties to see to it that the laws be faithfully executed is not subject to the approval or commentary of law professors, political rivals, or even courts. Courts must acknowledge the scope of a President's discretion in interpreting his official duties. This is not a question of what anyone likes or dislikes.

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[9] In *Joseph Scarnati*, in 2020-2021, an Amicus brief by the White House Watch Fund, attorney David Caroll, emphasized that when States appoint Electoral College electors they are wielding *Federal* authority – *not State* – under the U.S. Constitution, Art. II, Sec. 1. Thus, any departure from the State legislature's statutory rules such as a massive vote-by-mail scheme is a stolen election. No State or local official, Governor, etc. can rewrite the election system in mid-stream.

C. THE COURT SHOULD UPHOLD QUALIFIED IMMUNITY

The parties note the scarcity of precedents on the key points, however the position of a Governor as Chief Executive of his State or a judge provide parallel analyses:

> In all likelihood, the Attorney General and Governor are entitled to absolute immunity on these facts. See *Butz v. Economou*, 438 U.S. 478 (1978) (prosecutors entitled to absolute immunity); see also *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (legislators entitled to absolute immunity for legislative functions).
>
> Even if we assume that the Defendants were performing a discretionary rather than ministerial function in signing and enforcing a law, it is unmistakably clear that the Defendants are entitled to qualified immunity because their conduct was objectively legally reasonable. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Davis v. Sherer*, 468 U.S. 183 (1984); *Anderson v. Creighton*, 483 U.S. 635 (1987). The Appellants have not even come close to carrying their burden of convincing the court that the Defendants violated a clearly established constitutional right of which a reasonable person would have

> known. *Hilliard v. City and County of Denver*, 930 F.2d 1516 (10th Cir.1991). We think that the Governor and Attorney General are entitled to sign and enforce a facially valid law without fear of personal liability.

Gardner v. Bangerter, 46 F.3d 1151 (10th Cir. 1993)

> Although Governor Davis's review of Miller's parole grant, based on his erroneous reading of Article V, § 8(b), was in excess of his authority, it was not an act done in the "clear absence of all jurisdiction." Cf. *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir.1988) (holding that a judge who "misinterpreted a statute and erroneously exercised jurisdiction" did not act in the "clear absence of all jurisdiction").
>
> Accordingly, Governor Davis is entitled to absolute quasi-judicial immunity for his reversal of the Board's decisions granting Miller parole.6

Miller v. Davis, 521 F.3d 1142 (9th Cir. 2008)

> "And if we were to ignore the 'official capacity' language that the complaints used to describe Governor Pritzker's status, the churches still could not obtain damages, because the Governor would be entitled to qualified immunity."

Elim Romanian Pentecostal Church v. Pritzker, 22 F.4th 701 (7th Cir. 2022); *Accord, Church v. Missouri,* 913 F.3d 736 (8th Cir. 2019).

Meanwhile, the Speech and Debate Clause of the U.S. Constitution, Article I, Section 6, Clause 1 provides that Members of Congress cannot be made to answer for "legislative acts" in Congress. However, other actions can be prosecuted. *United States v. Brewster*, 408 U.S. 501, (1971). This Clause is limited to Congress, but it does endorse the immunity concept. This Court has interpreted the Clause very broadly. *United States v. Johnson*, 383 U.S. 169, 172, 178 (1966). Thus while it does not mandate immunity for other officers or branches of Government, it does suggest that presidential immunity is not unreasonable.

The analysis parallels judges, since a judicial act is very broad and varied like a President's duties:

> Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.
>
> * * *
>
> Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their

> motives cannot in this way be the subject of judicial inquiry.
>
> * * *

Bradley v. Fisher, 80 U.S. 335, 13 Wall. 335, 20 L.Ed. 646 (1871)

> Furthermore, as even respondents have admitted, at the time he approved the petition presented to him by Mrs. McFarlin, Judge Stump was "acting as a county circuit court judge." See supra, at 360. We may infer from the record that it was only because Judge Stump served in that position that Mrs. McFarlin, on the advice of counsel, submitted the petition to him for his approval....
>
> * * *
>
> Disagreement with the action taken by the judge, however, does not justify depriving that judge of his immunity. Despite the unfairness to litigants that sometimes results, the doctrine of judicial immunity is thought to be in the best interests of "the proper administration of justice . . . [, for it allows] a judicial officer, in exercising the authority vested in him [to] be free to act upon his own convictions, without apprehension of personal consequences to himself." Bradley v. Fisher, 13 Wall., at 347.

Stump v. Sparkman, 435 U.S. 349, 362-364, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978).

Suppose Justices allow a capital murder conviction and execution to stand, and the convict is put to death. Then DNA evidence is discovered proving the convict was innocent. Can the Honorable Justices be sued by survivors or worse prosecuted for the exercise of their Constitutionally appointed duties? Of course not.

A decision widely regarded as not merely wrong, but unnecessarily invasive over-stepping of this Court's role and outside the legitimate needs of this Court (though likely attempting to heal a looming rift in U.S. society), The Dred Scott decision, *Dred Scott v. John F. A. Sandford*, 60 U.S. 393, 19 How. 393, 15 L. Ed. 691, 1856 WL 8721, 1856 U.S. LEXIS 472 (1857), is widely considered an awful decision. But beyond all doubt those Justices 166 years ago were immune when doing their duty as best they knew how under the laws and constitution as they had them.

Yet an angry crowd urge that a core component of this Court's functioning should be denied to a President because "We don't like him." If there is any constitutional principle important for this Court to uphold is that the Constitution, its interpretation, and its application must govern the same regardless of who is involved or affected, whether we like them or dislike them.

D. GOVERNMENT ADMITS THAT ALLEGATIONS ARE OF IMMUNE OFFICIAL ACTS

In Paragraph 10 ("Manner and Means") the Indictment states that:

> c. The Defendant and co-conspirators attempted to use the power and authority of the Justice Department to conduct sham election crime investigations and to send a letter to the targeted states that falsely claimed that the Justice Department had identified significant concerns that may have impacted the election outcome; that sought to advance the Defendant's fraudulent elector plan by using the Justice Department's authority to falsely present the fraudulent electors as a valid alternative to the legitimate electors; and that urged, on behalf of the Justice Department, the targeted states' legislatures to convene to create the opportunity to choose the fraudulent electors over the legitimate electors.

The Indictment thereby admits that the actions alleged constitute official acts of the President, whether or not the wrong decisions. It is essential to keep in view that the exercise is not to judge the wisdom of an official's decisions, but whether working with the Justice Department is plausibly within his official acts.

Of equally strong interest, the allegation is that the attempt was to "urge[], on behalf of the Justice Department, the targeted states' legislatures ***to convene*** to offer the opportunity to choose the fraudulent electors over the legitimate

electors."

Thus, the Indictment further admits that the result of Trump's efforts would have been for the State legislatures to decide who are the legitimate electors. That is, both as alleged and as proven fact, Trump wanted the correct and authorized decision-makers under Article II, Section 1, to make (and confirm) their decision.

There is clearly no crime and no wrong in asking the duly authorized body empowered to select Electors to the Electoral College to do exactly what it is called and empowered to do.

As a rule, this Court should decide that an act that is already proper and legal cannot be a non-immune act. To ask the proper authority to do its job correctly cannot be prosecuted.

E. INVALID ALLEGATIONS NEED NO PRESIDENTIAL IMMUNITY, MAY BE REJECTED

Naturally, criminal allegations that can only be resolved on the evaluation of conflicting admissible evidence at trial are not susceptible of a motion to dismiss before trial on the basis of presidential immunity. (However, after the full evidence, a second look might be warranted.)

Nevertheless, before we consider whether Trump has presidential immunity for allegations of criminal misconduct, those allegations must be valid and relevant. If individual allegations state no crime nor support any crime, it is unnecessary

to test them under presidential immunity analysis. Here, most fail quite convincingly. Yet the Court should make clear that invalid allegations cannot proceed to trial.

Allegations of creating two sets of electors when everyone knows that one of the slates is the purported official one while the second is clearly part of a dispute cannot constitute any form of fraud. Fraud requires reasonable reliance on misrepresentation (concealment).

While the brief here by Alabama and 21 States is excellent, the Government's misrepresentation was unchallenged **"that Trump [allegedly] used [documents] to pressure Pence not to certify the election."**
https://www.supremecourt.gov/DocketPDF/23/23A745/300793/20240216132806756_States%20Brief%20in%20Trump%20v%20US%20FINAL%202.16.24.pdf

A main point of the Indictment here and in Georgia is that Trump and his supporters sought to stop the "certification" of the election which had already occurred on December 23, 2020.

There is no certification on January 6 and neither Trump nor his followers could commit any such crime. It is impossible.

A Vice President never "***certifies***" an election. Amendment 12 of the U.S. Constitution calls upon the presiding officer of the Senate to "***count***" the votes in the presence of the Joint Session of Congress. (Actually under the ECA, two tellers

are appointed who tally the Electoral College totals and report the math to the Vice President.)

Neither 3 U.S.C. §§ 1 to 19 before or after its 2022 amendment refers to the presiding officer "certifying" any election. See: https://www.govinfo.gov/content/pkg/USCODE-2011-title3/html/USCODE-2011-title3.htm The count may be affected by Congressional objections, but the count is only mathematics.

Trump and others urged Pence to let the States ***re-certify*** their electoral college counts by inquiring if the States remained certain of their electoral college votes. In Georgia, lawyers are being prosecuted for giving legal advice about whether the Vice President could inquire of, or send back to, the States their certificates of the Electoral College votes to let those States decide.

Therefore, if Trump had prevailed he would have received only that result chosen by that named body exclusively empowered to decide under Article II, Section 1. His efforts were to let the proper authorities make their proper decision.

This Court was asked to address rampant violations of state legislature rules about voting by *ad hoc* rewriting of election rules during COVID-19. However, this Court avoided decisions, such as in *Texas v. Pennsylvania,* 592 U.S. ___ (2020) and *Joseph B. Scarnati, et al. v. Pennsylvania Democratic Party, et al.*, Record No. 20-574 (2021).

About 20 States demanded that this Court address widespread non-compliance of election

officials with States' laws. Forty per cent of the Union contested the validity of the 2020 election.

Thus the resolution of what allegations are official acts should reject allegations that state no crime and are invalid within the context of this case. Those may not go to trial, harassing a former President for the exercise of his duties.

F. MANY OF THE ALLEGATIONS ARE INDEPENDENTLY BARRED BY THE FIRST AMENDMENT

Overwhelmingly, the criminal allegations against Donald Trump are that he believed things he was not supposed to believe, that people disagree with him, and he continues to believe what he believed even though other people do not; and Trump also said things people don't like, that they wouldn't have said, and they think are false.

No matter how Trump's detractors seek to dress it up, it is impossible upon diligently looking to miss the *gravamen* of the prosecution: He said things we don't agree with. He believes things we don't believe. He tried to explain to the public how his detractors are incorrect. It is a crime for Trump to say things we don't agree with.

All First Amendment precedents and especially *Brandenburg v. Ohio,* 395 U.S. 444 (1969) and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) bar prosecution. The First Amendment prevents prosecution on these facts. It is meritless to complain that the First Amendment does not protect crime, because

nothing of the sort is at issue before the Court now.

> **Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas").**

Gertz v. Robert Welch, Inc., 418 U. S. 323, 418 U. S. 339-340 (1974) (concurring opinion / dissent).

> Since the Fourteenth Amendment requires recognition of the conditional privilege for ***honest misstatements of fact,*** it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact.

New York Times Co. v. Sullivan, 376 U. S. 254, 376 U. S. 292, n. 30 (1964) *(emphasis added).*

This Court should order that all Presidents are immune from prosecution for the exercise of free speech and petition for redress protected by the First Amendment. One does not lose her First Amendment rights on account of being President.

As disturbing as was the original subject matter in 1960s threats, this Court has spoken in *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

A reporter covered a large gathering described by the Ohio KKK as organizing, what was to be:

> "We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."

The U.S. Supreme Court determined that

> These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. * * * A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. Cf. *Yates v. United States*, 354 U.S. 298 (1957); *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Stromberg v. California*, 283 U.S. 359 (1931). See also *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Aptheker v. Secretary*

of State, 378 U.S. 500 (1964); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

* * *

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) is strikingly similar to the allegations now against Trump, although of course concerning racial discrimination instead of election integrity. *(Emphasis added.)*

> The boycott of white merchants in Claiborne County, Miss., that gave rise to this litigation had such a character; ***it included elements of criminality and elements of majesty.***[10] Evidence that fear of reprisals caused some black citizens to withhold their patronage from respondents' businesses convinced the Supreme Court of Mississippi that the entire boycott was unlawful, and that each of the 92 petitioners was liable for all of its economic consequences. Evidence that persuasive rhetoric, determination to remedy past injustices, and a host of voluntary decisions by free citizens were the critical factors in the boycott's success presents us with the question whether the state court's judgment is consistent with the Constitution of the United States.
>
> * * *

[10] Critics are sent into fits of rage at any suggestion that different people did different things on January 6 around the 750-foot-long Capitol building. They were not automatons.

The Mississippi Supreme Court quoted from the trial court:

> In carrying out the agreement and design, certain of the defendants, acting for all others, engaged in acts of physical force and violence against the persons and property of certain customers and prospective customers. Intimidation, threats, social ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results.
>
> * * *

This U.S. Supreme Court decided that:

> * * * As we so recently acknowledged in *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley,* 454 U. S. 290, 454 U. S. 294,
>
> > "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."
>
> We recognized that, "by collective effort, individuals can make their views known when, individually, their voices would be faint or lost." *Ibid.* * * *
>
> * * *

This Supreme Court concluded:

> The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected.

Therefore, most allegations against Trump are prohibited by the immunity of the First Amendment. We focus on the remaining allegations to try to resolve this case here. See Table, attached.

G. ALTERNATIVE ELECTOR SLATES ARE OFFICIAL ACTS AND THEREFORE NOT CAPABLE OF BEING CRIMES

One of the most serious allegations is of creating alternative slates of electors. It appears that there are no allegations of Defendant Trump taking any action concerning these bogus charges.

This is historical and legal ignorance. Presenting alternative slates of electors is required where there is a dispute so that the Congress or the courts can choose one. For example, if it were contended that a will dated 1991 was invalid but the will dated 1993 is the correct one, any court would want to see both.

Hawaii was praised by courts for doing so in 1960. "1960: Hawaii Sends Two Slates to Electoral College," Hawai'i Free Press, October 26, 2020,

https://www.hawaiifreepress.com/Articles-Main/ID/26628/1960-Hawaii-Sends-Two-Slates-to-Electoral-College. ("Kennedy eventually was declared the winner in the Hawaii recount by 115 votes, but the two sets of certifications were waiting when the joint session of Congress convened. Democrats, including Rep. Daniel K. Inouye, were ready to lodge an objection if the GOP slate was counted, but the presiding officer — the Senate president, who also is the vice president: i.e., Nixon — pushed the issue aside.")

In 2020, supporters of Donald Trump's re-election copied the John F. Kennedy 1960 alternative slate of electors word for word, format for format, precisely. But apparently when JFK did it, it was good. When Trump does it, it's bad.

Presenting alternative slates of electors is a necessary part of an election contest. It cannot be a crime nor an element supporting a crime.

Moreover, there can legally be no fraud or any species like it. Fraud requires reasonable reliance upon a misrepresentation, basically concealing the truth. Here, the entire planet to the extent having news access knew which States certified Electoral College victories for Joe Biden instead of Trump.

Presenting two slates of alternative electors is incapable of being fraud where there is no concealment. Any reasonable person knew there to be a dispute with one slate of electors being the Biden electors certified to be correct and the Trump electors offered in dispute as a substitute – all out in the open in the light of day for all to see.

Therefore, the allegations upon which this Indictment crucially rests do not state any crime nor any element of any crime nor do they support any finding of any crime. Everyone knew and would immediately know that two slates are being offered in a dispute, not that the Trump slate was the one and only slate of electors.

H. SPECIAL COUNSEL'S POSITION CONFLICTS WITH DOJ POLICY

There is no compelling reason for a quick trial when criminal prosecution near to an election is officially prohibited by DoJ policy. Because this case violates DoJ policy, long-standing and well-established, all affected cases should be stayed until December 2024 or after

> Federal prosecutors and agents may never select the timing of any action, including investigative steps, criminal charges, or statements, for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party. Such a purpose is inconsistent with the Department's mission and with the Principles of Federal Prosecution. *See* § 9-27.260. Any action likely to raise an issue or the perception of an issue under this provision requires consultation with the Public Integrity Section, and such action shall not be taken if the Public Integrity Section advises that further

> consultation is required with the Deputy Attorney General or Attorney General.

Section 9-85.500 of the Justice Department's Justice Manual, https://www.justice.gov/jm/jm-9-85000-protection-government-integrity#9-85.500

> Simply put, politics must play no role in the decisions of federal investigators or prosecutors regarding any investigation or criminal charges. Law enforcement officers and prosecutors may never select the timing of investigative steps or criminal charges for the purpose of affecting any election, or the purpose of giving an advantage or disadvantage to any candidate or political party.

Memorandum, March 9, 2012, Attorney General Eric Holder to all Department Employees, "Election Year Sensitivities."[11]

In a February 2020 Memorandum, Attorney General Barr endorsed these and went further. [12]

[Republished verbatim]
Memorandum, April 11, 2016, Attorney General Loretta Lynch to all Department Employees,

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[11] https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-election-year-sensitivities.pdf

[12] Pete Williams," Barr says no investigations into 2020 candidates, campaigns without his approval," NBC News, February 6, 2020. https://www.nbcnews.com/politics/justice-department/barr-says-no-investigations-2020-candidates-campaigns-without-his-approval-n1131836

"Election Year Sensitivities."[13]

[Nearly Identical]
Memorandum, March 5, 2008, Attorney General Michael B. Mukasey to all Department Employees, "Election Year Sensitivities."[14]

The claims of the indictment track the February 2021 impeachment. They are nearly identical to the February 16, 2021, Complaint in the lawsuit of *Bennie Thompson v. Donald Trump, et al.*, Case 1:21-cv-0400-APM, which was Amended on April 7, 2021.

A deeply distrustful and angry public needs to see at this moment perhaps more than in decades the U.S. Supreme Court following the straight and narrow path in normalcy, that Justice is wearing her blindfold. There may be no other institution at this troubled moment that can stand above the passions of bias and prejudice.

VI. CONCLUSION

The Supreme Court should develop and/or affirm a single uniform concept of immunity, and bar prosecution of official acts as identified in the attached table of allegations.

Respectfully submitted, *BY COUNSEL*

/s/ George T. Pallas, Esq.

[13] https://s3.documentcloud.org/documents/4439553/Election-Year-Sensitivities-2016.pdf
[14] https://www.justice.gov/sites/default/files/ag/legacy/2009/02/10/ag-030508.pdf

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