IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	CRIMINAL NO. 23-cr-257 (TSC)
DONALD J. TRUMP,	)	
Defendant.	)	

MOTION OF FORMER OFFICIALS IN FIVE REPUBLICAN ADMINISTRATIONS, *ET AL.* FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS INDICTMENT BASED ON PRESIDENTIAL IMMUNITY

October 20, 2023

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INTRODUCTION AND SUMMARY OF REASONS TO GRANT LEAVE

This Court has stated that, in a criminal case before this Court, in the "ordinary procedural course," this Court will deny leave to file an amicus brief in most instances. The 11-page appended brief warrants a departure from this Court's ordinary practice. This is because the appended brief demonstrates narrow, dispositive grounds for deciding a legal issue with broad implications beyond this case, where no party has briefed these particular grounds.

First, the appended brief is the first brief ever to argue that protecting the four-year term and re-election requirements in the Executive Vesting Clause in Article II, Section 1, Clause 1 of the Constitution, provides narrow, dispositive grounds to reject a potential defense of absolute presidential immunity. The former President's opening brief (at 22) and the government's brief in response (at 40) each made one reference to the Executive Vesting Clause. But neither discussed the Clause's four-year term and re-election requirements. However, on a legal issue like absolute presidential immunity, a court may adopt its own legal analysis or supplement the legal analyses of the parties. *See, e.g., Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032-36 (2020) (Court "disagree[s]" with positions of President Trump, the United States, and the House of Representatives, and adopts its own and different "careful analysis").

Second, amici's appended brief shows that the Executive Vesting Clause provides important, very narrow, and dispositive grounds to deny defendant's motion. This Clause requires that a President "be elected" for each "Term of Four

Years." This Clause thus requires a first-term President who loses re-election to leave office. The impact of the Clause was not and could not have been addressed in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), because that case did not involve a presidential election.

The absolute immunity claimed by former President Trump would immunize and thereby encourage future first-term Presidents who lose re-election to attempt to violate the Executive Vesting Clause by knowingly usurping a second term and preventing their elected successors from commencing their exercise of the executive power. Such immunity itself would pose "the dangers of intrusion on the authority and functions of the Executive Branch." *Id.* at 754. To vindicate the Executive Vesting Clause, one ground on which the Court should reject absolute immunity is that a first-term President's post-election day efforts to overturn election results are candidate activities that are not official duties.

Nixon v. Fitzgerald also recognized a greater "public interest" in criminal prosecutions than in civil damages actions. 457 U.S. at 754 n.37. The public interest in criminal prosecutions that serve to preserve and defend the requirements in the Executive Vesting Clause provides an additional ground to reject absolute immunity. Upholding those requirements is essential to preserving government by the People through electing their President every four years. Accordingly, at a minimum, absolute immunity should not apply to criminal prosecutions in this context, even *assuming* such immunity would bar civil damages actions, or a criminal prosecution in a different, readily distinguishable context.

Third, the impact of absolute immunity on the Executive Vesting Clause is the issue in this case that threatens the greatest danger to public interests outside this case – namely, the danger to the sanctity of future Presidential elections. In our divided nation, in the last eight re-election campaigns, the incumbent lost four times (1976, 1980, 1992, and 2020) and won competitive races twice (2004 and 2012). Granting absolute immunity in this case would incentivize even knowing and corrupt illegal conduct by a first-term President to usurp another term, and thus would imperil the Executive Vesting Clause.

The appended brief is limited strictly to arguing that the Executive Vesting Clause provides narrow grounds to deny absolute immunity. In light of the Court's prior orders in this case denying leave to file amici briefs, there is no other forthcoming issue in this case on which amici or their counsel have any reason to believe they would seek, in this Court, leave to file an amicus brief.[1] In addition, if the Court grants leave to file the appended brief, amici and their counsel will *not* seek leave from this Court to file a response to any counter-arguments made by defendant concerning Executive Vesting Clause legal issues.[2]

Finally, the appended amici brief does *not* address the defendant's ultimate factual innocence or guilt of the crimes charged.

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1 Before those orders, five of the 24 current amici joined in a motion for leave to file a different amicus brief concerning a speedy trial. The Court denied leave.

2 Similarly, if defendant files a written opposition to this motion for leave, amici and their counsel will not seek leave from this Court to file a reply. In the event that this Court *sua sponte* requested an additional brief from amici, amici and their counsel of course would comply.

ARGUMENT

With as little repetition of our Introduction and Summary of Reasons to Grant Leave as possible, amici briefly address five traditional considerations for granting leave to file an *amicus* brief.

I. Nature of the Interest of the Amici.

Amici include persons who have worked in five Republican federal administrations, served as Republican elected officials, constitutional scholars, and others who support a strong Presidency. *See* Appendix A. *Amici* have an interest in a strong Presidency, where each elected President does not attempt to exercise executive power in a term for which he or she has not been elected.

II. Why a Brief *Amici Curiae* Is Desirable.

The appended *amici* brief is the first brief to address the implications of the four-year term and re-election requirements in the Executive Vesting Clause for an asserted defense of absolute immunity.

III. Why Amici's Position Is Not Adequately Addressed by a Party.

Neither former President Trump's opening brief nor the government's response addressed the impact of the four-year term and re-election requirements in the Executive Vesting Clause on potential absolute immunity.

IV. Why the Matters Asserted in the Brief Are Relevant to the Disposition of this Case.

As set forth above in the Introduction and Summary of Reasons to Grant Leave, rejecting absolute immunity based on the Executive Vesting Clause provides important, dispositive, and very narrow grounds to deny defendant's motion.

V. Positions of the Parties.

Defendant opposes this motion. The government did not take a position.

CONCLUSION

For the foregoing reasons, proposed amici request that this Court grant leave to file their brief, attached as Exhibit A, in opposition to defendant's motion to dismiss.

October 20, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Matthew Edwards, hereby certify that on October 20, 2023, I caused a true and correct copy of the foregoing Motion of Former Officials in Five Republican Administrations, et al. for Leave to File an Amici Curiae Brief in Opposition to Defendant's Motion to Dismiss Indictment Based on Presidential Immunity, including the Amici Curiae Brief appended thereto, to be served on counsel of record for the Government and the Defendant listed on the docket via the Court's ECF system and via electronic mail as follows:

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APPENDIX A

LIST OF AMICI CURIAE[1]

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

Barbara Comstock, Representative of the Tenth Congressional District of Virginia, United States House of Representatives, 2015-2019; Member of the Virginia House of Delegates, 2010-2014; Director of Public Affairs, United States Department of Justice, 2002-2003; Chief Investigative Counsel, Committee on Government Reform of the United States House of Representatives, 1995-1999.

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

Charles Fried, Solicitor General, 1985-1989; Associate Justice, Massachusetts Supreme Judicial Court, 1995-1999; currently, the Beneficial Professor of Law at Harvard Law School.

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

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

Peter Keisler, Acting Attorney General, 2007; Assistant Attorney

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

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

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

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

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

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

Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, 1981-1984; Deputy Assistant Attorney General, Antitrust Division, 1975-1977; Associate Deputy Attorney General and Director, Office of Justice Policy and Planning, 1974-1975; General Counsel, Council on International Economic Policy, 1972-1974; Special Assistant to the President, 1971-1972; White House Staff Assistant, 1969-1971.

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

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

Research Scholar at Yale Law School.

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

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

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

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

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

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

Keith E. Whittington. William Nelson Cromwell Professor of Politics, Princeton University, 2006-present; currently Visiting Professor of Law, Georgetown University Law Center.

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

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

Proposed Amici Curiae Brief

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AMICI CURIAE BRIEF OF FORMER OFFICIALS IN FIVE REPUBLICAN ADMINISTRATIONS, _ET AL._ IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS INDICTMENT BASED ON PRESIDENTIAL IMMUNITY

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TABLE OF CONTENTS

TABLE OF CONTENTS.. i

TABLE OF AUTHORITIES... ii

INTEREST OF AMICI CURIAE AND INTRODUCTION............................. 1

ARGUMENT.. 2

I. A President Who Loses Re-Election But Attempts to Stay Beyond His Term Is Attempting to Violate the Executive Vesting Clause.. 2

II. Absolute Immunity Does Not Protect A President's Attempt To Violate The Executive Vesting Clause.................................. 4

A. A First-Term President's Efforts to Overturn An Election Loss Are Candidate Activities Outside That President's Official Duties.. 8

B. At Least In A Criminal Case, The Public Interest Precludes Immunizing A President's Attempt to Usurp A Second Term... 10

CONCLUSION.. 11

TABLE OF AUTHORITIES

Page(s)

Cases

Chiafalo v. Washington,
140 S. Ct. 2316 (2020) 10
Nixon v. Fitzgerald,
457 U.S. 731 (1982) .... passim
Seila Law LLC v. Consumer Financial Protection Bureau,
140 S. Ct. 2183 (2020) 10
Trump v. Vance,
140 S. Ct. 2412 (2020) 6
United States v. Brewster,
408 U.S. 501 (1972) 9

U.S. Constitution

U.S. Const. art. II, § 1, cl. 1.......... 2-3
U.S. Const. art. II, § 1, cl. 2.......... 8
U.S. Const. art. II, § 1, cl. 3.......... 8
U.S. Const. amend. XX, § 1.......... 7

Other Sources

J. Elliot ed., The Debates in the Several State Conventions (2d ed. 1888)....... 3-4
M. Farrand ed., *Records of the Federal Convention,* (1911).......... 3
D. Forte, *Presidential Term*, Article II, Section 1, Clause 1
www.heritage.org.......... 4
Goodman & Asabor, *In Their Own Words: The 43 Republicans' Explanations of Their Votes Not To Convict Trump in Impeachment Trials* (Feb. 2021)
www.justsecurity.org.......... 9

INTEREST OF *AMICI CURIAE* AND INTRODUCTION

Amici include former officials who have worked in five Republican administrations from Presidents Nixon to George W. Bush, served as elected Republican officials, are constitutional scholars, and others who support a strong Presidency. *See* Appendix A.[1] Reflecting their experience, *amici* have an interest in a strong Presidency where each elected President serves only the term or terms to which he or she has been elected. *Amici* speak only for themselves personally, and not for any entity or other person.

Presidential immunity far exceeds its purpose and outer perimeter where its proposed scope would encourage Presidents who lost re-election to use criminal conduct to attempt to prevent the vesting of executive power required by Article II in their lawfully elected successors. That is the case here.

A core allegation of the Indictment is that former President Trump knew that it was false to say there had been "outcome-determinative voting fraud in the [2020] election and that he had actually won," but nonetheless engaged in illegal lies and conspiracies "to overturn the legitimate results of the 2020 presidential election and retain power."[2] Under these allegations, former President Trump allegedly tried to

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

[2] Indictment (Dkt. 1), ¶¶ 2, 4, 7-8; *see also, e.g., id.* at ¶¶10-13, 15, 19-20, 22, 25, 29-33, 35-37, 41, 45-46, 50, 52, 56, 64, 66-67, 70, 74, 77, 81, 83, 86, 90, 92, 99-100, 102, 104, 116, 118. Amici do not address either the strength of the government's proof of the Indictment's allegations or any defense former President Trump has asserted or may assert, other than absolute immunity.

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

In addition to other reasons the government has raised, deterring future attempts to violate the Executive Vesting Clause requires rejecting Mr. Trump's claim of an absolute immunity so broad that it would bar prosecution of a first-term President whose post-election day efforts knowingly employed criminal conduct to overturn election results. Such a rejection is necessary to protect the government by the People that the Executive Vesting Clause guarantees. Such rejection also accords with the reasoning of *Nixon v. Fitzgerald,* 457 U.S. 731 (1982). That case stated that absolute immunity's purpose was to prevent, not encourage, "the dangers of intrusion on the authority and functions of the Executive Branch," *id.* at 754, and that the "public interest" is greater in criminal prosecutions than in civil actions. *Id.* at 754 n.37.

ARGUMENT

I. A PRESIDENT WHO LOSES RE-ELECTION BUT ATTEMPTS TO STAY BEYOND HIS TERM IS ATTEMPTING TO VIOLATE THE EXECUTIVE VESTING CLAUSE.

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

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

(Emphases added.) This Executive Vesting Clause creates the Presidency and requires vesting the executive power in each elected President.

The second sentence of the Clause requires a first-term President who loses re-election to leave office at the end of his term. This was an important selling point during ratification. The Constitutional Convention initially adopted provisions of a draft Constitution that would elect a President for a single seven-year term and make each President ineligible for re-election. 1 M. Farrand ed., *Records of the Federal Convention,* 64, 68-69 (1911). The Convention later switched course and framed a Constitution that enabled a President to seek re-election, but the Executive Vesting Clause limited every presidential term to four years.

This major change was explained by Edmund Randolph, who was a delegate at both the Constitutional Convention and the Virginia Ratifying Convention.[3] Randolph explained to the Virginia Ratifying Convention that, at the Constitutional Convention, his original position was "that the reeligibility of the President was improper." 3 J. Elliot ed., *The Debates in the Several State Conventions* 485 (2d ed. 1888). He "altered [his] opinion" and subsequently defended the Constitution's permission for re-election by relying on the mandates of the Executive Vesting Clause. *Id.* at 485-86. He stated that a sitting President "may [not] hold his office without being reelected. He cannot hold it over four years, unless he be reelected, any more than if he were prohibited [from running]." *Id.* at 486. Randolph stated that a President who loses re-election is "displaced at the end of the four years" by the Executive Vesting Clause. *Id.* at 486.

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[3] At both times, he was also Governor of Virginia. He would later be President George Washington's first Attorney General and second Secretary of State.

Presidents from John Adams to George H.W. Bush who lost re-election obeyed the Executive Vesting Clause by peacefully transferring the powers of the Presidency to their elected successors. As was written in The Heritage Foundation's *Guide to the Constitution* before the 2020 election: "It should be noted that the four-year limitation is absolute, and every president (no matter how disputed the election results may have been) has always turned the office over to his successor on the appointed day. . . ." D. Forte, *Presidential Term,* Article II, Section 1, Clause 1 (available at www.heritage.org).

In contrast, any President who loses re-election, but attempts to usurp the office of the Presidency beyond his four-year term, would be attempting to violate the Executive Vesting Clause in two inseparable ways. First, that President would be attempting to extend the four-year term – and *only* four years – in which executive power has been vested by election in that President. Second, that President would be attempting to prevent the vesting of the functions and authority of the Presidency in the *newly-elected* President.

Former President Trump's motion in effect argues that a former President who knowingly employs criminal conduct in attempting these two violations of the Executive Vesting Clause nonetheless has absolute immunity. Part II of this brief demonstrates why this is wrong.

II. ABSOLUTE IMMUNITY DOES NOT PROTECT A PRESIDENT'S ATTEMPT TO VIOLATE THE EXECUTIVE VESTING CLAUSE.

Former President Trump claims a scope of absolute immunity that would protect even a President who lost re-election, knew it, and deliberately used

criminal conduct to "to overturn the legitimate results of . . . [a] presidential election and retain power," Indictment ¶ 8. Former President Trump's immunity argument improperly undermines the Executive Vesting Clause by encouraging Presidents, after losing re-election, to engage in criminal conduct to attempt to usurp the powers of the Presidency. No case supports such immunity.

Nixon v. Fitzgerald addressed civil damages for firing a federal employee. The plaintiff did not and could not allege that his firing had anything to do with presidential election results. The reasoning of *Nixon v. Fitzgerald* was that it "must balance the constitutional weight of the interest to be served [by civil damages] against the dangers of intrusion on the authority and functions of the Executive Branch." 457 U.S. at 754. The Court cautioned that "[i]n defining the scope of an official's absolute privilege, . . . the sphere of protected action must be related closely to the immunity's justifying purposes." 457 U.S. at 755. Where these purposes apply, the Court adopted a defense of "absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." 457 U.S. at 756. Such damages immunity is strong medicine because where it applies, it immunizes from damages *even a President's illegal conduct undertaken with illicit knowledge and a corrupt motive. See id.*

Nixon v. Fitzgerald reserved deciding whether presidential absolute immunity applies at all in the criminal context, much less in which cases. This was because, "[t]he Court has recognized . . . that there is a lesser public interest in

actions for civil damages than, for example, in criminal prosecutions." 457 U.S. at 754 & n.37.

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

In these two prior cases, "the Article II interests of the Presidency" were entirely on the side of the former or sitting President. No one ever argued that Article II supported the damages suit in *Fitzgerald* or the subpoena in *Vance*.

But in the new and different context presented by the current allegations against former President Trump, where the Executive Vesting Clause is at stake, both the interests of the criminal process *and* vital Article II interests of the Presidency support legal accountability and oppose absolute immunity. *Amici* are not advocating case-by-case balancing. This case presents an entirely different category that *Nixon v. Fitzgerald* did not and could not decide – immunity that would encourage a President to use criminal conduct to usurp the Presidency itself. *Nixon v. Fitzgerald* addressed only the category where a President allegedly injures "individuals" who sue for damages. 457 U.S. at 754 n.37.

To protect the Presidency itself, absolute immunity should not apply to a first-term President's post-election day use of criminal conduct to overturn election

results showing he or she has lost. Rejecting such immunity is essential to protect the mandate of the Executive Vesting Clause, as amended by the Twentieth Amendment, that the authority and functions of the Presiden*cy* be vested in a new President on the subsequent January 20.[4]

What kind of Constitution would permit immunity so broad that it encourages losing first-term Presidents to employ criminal conduct knowingly and corruptly to attempt to usurp a second term? Not our Constitution with the Executive Vesting Clause's clear mandate: four years, you lose, get out, the Presidency is vested in your successor.

There is a fundamental difference between the context of *Nixon v. Fitzgerald* and the context of this case as to which side has the support of the Article II interests of the Presidency. Just as a village is not saved by destroying it, the functions and authority of the elected Presidency vested by Article II would be imperiled—*not* preserved—by an immunity so broad that it would encourage first-term Presidents knowingly to employ, after election day, criminal conduct to prevent the Presidency's functions and authority from being vested in their lawfully-elected successors.

The absence of immunity in this context would not restrain first-term Presidents from vigorously challenging state results showing that they lost. A first-

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[4] *See also* Twentieth Amendment, Section 1 ("The terms of the President and the Vice-President *shall end* at noon on the 20th day of January . . .; and the terms of their successors *shall then begin*.") (Emphases added).

term President may pursue such a vigorous challenge with all of the rights of any other candidate, including both the First Amendment rights and access to the courts that Al Gore and George W. Bush exercised in 2000. And he or she may employ any means other than illegal conduct. A President merely does not have an additional absolute immunity so broad that it encourages knowingly criminal conduct that seeks to overturn presidential election results. Subparts II.A and II.B below demonstrate two narrow, independently sufficient grounds that vindicate the Executive Vesting Clause by rejecting absolute immunity in this context.

A. A First-Term President's Efforts To Overturn An Election Loss Are Candidate Activities Outside That President's Official Duties.

The first of these narrow grounds for rejecting immunity, and thus vindicating the Executive Vesting Clause, is that post-election day efforts by a first-term President to overturn state election results are candidate activities outside the outer perimeter of the duties of the office. The Executive Vesting Clause requires the President "be elected, *as follows* . . . " (Emphasis added.) Two Clauses of Article II, Section 1 follow. Each assigns the official duties for presidential election results. Under Clause 2, in each state, state law governs, including specifying the state officials who determine which candidate won. Under Clause 3, Congress and the Vice President have official duties concerning the counting of electoral votes. Article II assigns the President zero duties concerning presidential election results. It would contradict the requirements of the Executive Vesting Clause for the President nonetheless to have absolute immunity here.

It is logical that the reason Article II assigned no official functions to a President concerning presidential election results is that a President might try to avoid the ignominy of electoral defeat by lying or intimidation. Accordingly, a court should not construe a first-term President's official duties after losing an election so broadly as to immunize, and thereby encourage, a President's knowingly criminal conduct employed in an attempt to usurp another term in violation of the Executive Vesting Clause.

Rejecting such immunity would not limit the perimeter of the President's duties or the scope of absolute immunity in any other context. When a first-term President seeks to overturn presidential election results through criminal conduct, that President poses a significant and unique danger to the Executive Vesting Clause. No President could pose even a remotely comparable danger either in a second term or before election day in a President's first term.[5]

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[5] Because of the Twenty-Second Amendment, no second-term President could usurp a third term. And in a first term, before election day, a President's desire to win votes and avoid impeachment consequences provides much greater incentives to avoid an attempt to seize a second term. *See Nixon v. Fitzgerald,* 457 U.S. at 757 ("credible . . . threat of impeachment" and "a desire to earn reelection" are among the "incentives to avoid misconduct"). After election day, there are no votes, and there may be too little time for impeachment consequences after wrongdoing is discovered. Indeed, in the most recent Senate trial of former President Trump, 38 senators opposed conviction and disqualification based on agreeing with the former President's position that there is no impeachment jurisdiction over a former President. *See* Goodman & Asabor, *In Their Own Words: The 43 Republicans' Explanations of Their Votes Not To Convict Trump in Impeachment Trials* (Feb. 2021) (22 cited lack of jurisdiction as the only reason and 16 cited it as one of the reasons), available at www.justsecurity.org; *see also United States v. Brewster,* 408 U.S. 501, 520 (1972)

B. At Least In A Criminal Case, The Public Interest Precludes Immunizing A President's Attempt To Usurp A Second Term.

The second of the narrow grounds that vindicates the Executive Vesting Clause is the "public interest," *Nixon v. Fitzgerald*, 457 U.S. at 754 n.37, in rejecting absolute immunity in a criminal case that alleges a President attempted to usurp a second term – *even assuming* such immunity may be appropriate for civil cases or some other distinguishable criminal context. The public interest in criminal prosecutions that preserve and defend the Executive Vesting Clause could not be higher. That Clause is essential to fulfilling what the Supreme Court, in a 2020 Article II case, called "the trust of a Nation that here, We the People rule." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020).

The Executive Vesting Clause ensures government by the People by mandating that a first-term President leaves at the end of a four-year term when the People have elected someone else for the following term.[6] As the Supreme Court recently held, "[t]o justify and check" the President's "unique [authority] in our constitutional structure," Article II "render[s] the President directly accountable to the people through regular elections." *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2203 (2020). The paramount public interest against tyranny is thus antithetical to creating absolute immunity from criminal

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(one reason for a narrower scope of Speech and Debate immunity was that "it is unclear to what extent Congress would have jurisdiction" over a former member).

[6] Every state has exercised its Article II powers to choose the popular vote as the manner to elect a President. *See Chiafalo*, 140 S. Ct. at 2321-22.

prosecution that is so broad that it would immunize a President who loses re-election but uses criminal conduct to attempt to usurp a second term.

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Ultimately, to convict former President Trump in this case, the government must prove beyond a reasonable doubt that the defendant committed the illegal conduct required by the elements of one or more of the four criminal statutes at issue. *If* the government proves the Indictment's allegations beyond a reasonable doubt, it would simultaneously prove that former President Trump knowingly attempted to usurp the functions of the Presidency for an additional term after he lost the election. Rejecting defendant's absolute immunity motion is necessary to vindicate the Article II interests of the Presidency and safeguard government by the People, by ensuring that a first-term President will never be encouraged to try to usurp a second term after losing re-election.

CONCLUSION

This Court should deny the defendant's motion to dismiss the indictment based on presidential immunity.

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Respectfully submitted,

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