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 U.S. Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE FOR THE PUERTO RICO HOUSE OF REPRESENTATIVES IN SUPPORT OF RESPONDENT, THE UNITED STATES

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The appearing *amicus curiae*, the Puerto Rico House of Representatives is the oldest democratic institution in Puerto Rico, created by the 1900 Organic Act, 31 Stat. 77[2]. The current Nineteenth Legislative Assembly[3] is the most diverse in modern Puerto Rico's history with 5 different political parties having elected members to the House. Pursuant to Article 5.2(p) of the current General House Rules (House Resolution 161), the Speaker is authorized to make court appearances on behalf of the legislative body. The Speaker has duly authorized the filing of the foregoing brief.

Under Speaker Hernández-Montañez' leadership, the House has been a staunch and passionate advocate of legislative powers and has appeared both as a party and as *amicus* in multiple judicial proceedings to contest the encroachment of its prerogatives by the Financial Oversight and Management Board for

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[1] As the record shows, all parties have issued blanket consent statements regarding the appearance of *amici*. *Amicus* hereby further certifies, as per this Honorable Court's Rule 37.6 that no party or counsel for a party has authored any part of the foregoing brief nor has any of the parties and/or their attorneys made a monetary contribution to fund the filing of this brief. No person other than the *amicus* or its counsel have made a monetary contribution to its preparation or submission.

[2] Under this legislation the "House of Delegates", as it was then called, was the only government institution whose members were selected through popular vote as all other components of the territorial government were either appointed by the President of the United States or by the Governor.

[3] Although the House has been in continuous operation since 1900, the Number Nineteen corresponds to the terms since the post-1952 constitutional era. Both houses of the Puerto Rico Legislature serve 4-year terms with elections held on November of every leap year and the elected bodies being inaugurated on January 2nd of the post-election year.

Puerto Rico, created under the Puerto Rico Oversight, Management and Financial Stability Act, 48 U.S.C. § 2101, et seq[4]. Some of the House's appearances before this Honorable Court have pertained to non-PROMESA matters in which important separation of powers considerations were being raised.

The Commonwealth of Puerto Rico's Constitution, enacted on July 25, 1952, is structured under a republican government model that mirrors the one fashioned by the U.S. Constitution, with similar checks and balances built into it. The same is true of Puerto Rico's constitutional impeachment and removal procedures applicable to the Commonwealth's chief executive, the governor. Because the Puerto Rico Supreme Court affords this Honorable Court's precedent on separation of powers controversies enormous persuasive force, the House feels compelled to vehemently oppose petitioner's dangerous thesis. If Mr. Trump's theory was to become the law of the land, the president of the United States would be above the law, *unless* the U.S. House of Representatives swiftly impeaches a lawless commander in chief and a supermajority of the U.S. Senate removes him from office. Because petitioner misconstrues the Impeachment Judgment Clause in a way that is irreconcilable with the intended purpose of that *political* process, we now proffer arguments to show that possible criminal exposure is not a subject that is considered by legislators during impeachment and removal.

SUMMARY OF ARGUMENT

Petitioner proposes the boldest expansion possible of executive power: an absolute get-out-of jail card for any and all crimes committed while holding

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[4] *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1655 (2020) (explaining the Board's creation and role).

the office of president. The only caveat that petitioner proposes is that there is a slight crack in a former president's armor against possible criminal liability, namely, that a former president may be charged for criminal conduct upon which he or she has previously been impeached for and for which two thirds of the Senate have convicted him of.

Mr. Trump's immunity argument, in of itself is hard to swallow just on the naked authoritarian implications that it carries. The only federal officers that the Founders bothered to expressly protect from criminal liability were members of Congress. This Honorable Court has held congresspeople to be absolutely immune from civil liability arising from their discharge of official acts but said officers' criminal immunity has been limited to core legislative speech. In this case, former president Trump seek the broadest possible immunity, despite there being no express constitutional provision exempting the executive from being held to account. When measured against how the express grant of immunity contained in the Speech or Debates Clause has been handled, petitioner's plea is easily dismissed as overbroad.

Contrary to petitioner's proposed fallacy, the fact that he is the first former president to be criminally charged is not probative of a general understanding that such prosecutions are proscribed. The historical record sharply belies this assertion, particularly when we look into the record created by the two previous presidents who flirted the closest with criminal exposure.

Finally and most importantly from the appearing *amicus'* point of view, it is impossible to support Mr. Trump's thesis that a president's accountability for criminal behavior is intrinsically tied to whether

or not the House impeached and the Senate convicted him or her of that same conduct. The legal standards for the issuance of political sanctions by Congress could not be any more different to the stringent legal standard for convicting someone in court. Also, the scope of possible impeachable offense pales in comparison to the wide array of penal statutes that citizens are expected to abide by, and it changes from one Congress to another. Just as mutable and therefore consistent is the opinion of whether or not a former president is subject to impeachment and removal, which is relevant since a rogue president is free to resign whenever he or she likes. Most importantly, impeachment and impeachment trials are handled by the most political of bodies. The historical record of the four impeachment trials held to date clearly shows that it is very unlikely that senators aligned with the impeached president's political views would vote to convict. It cannot be that adherence to laws involving criminal penalties be tied to the whimsical and fickle political loyalties of any particular era.

ARGUMENT

A) PETITIONER'S RADICAL POSITION ON IMMUNITY

One of the most basic axioms upon which the United States legal system is premised is that the Constitution created "a government of laws and not men". *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). Consequently, it necessarily follows that:

> *No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.*

> It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

United States v. Lee, 106 U.S. 196, 220 (1882) (emphasis added)

When an embattled President Nixon attempted to escape accountability by raising arguments along the lines of what petitioner is arguing in this case, the D.C. Circuit easily disponed of the argument as follows:

> Though the President is elected by nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. He is not above the law's commands: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law. . . ." Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen.

Nixon v. Sirica, 487 F.2d 700, 711 (D.C. Cir. 1973) (per curiam)

It being the general rule that the law binds everyone regardless of how high a station they hold,

immunity doctrines, in general, must necessarily only be applied where the most compelling interests require a departure from the general rule. In the instant case, petitioner seems to be proposing that, in order for the president of the United States to carry out his or her main constitutional duty "to take Care that the Laws be *faithfully executed*", he or she must be granted leeway to disregard the law with impunity. U.S. Constitution, Art. II, § 3 (emphasis added).

Common law principles of legislative and judicial immunity have ordinarily been applied by this Honorable Court. *Pulliam v. Allen*, 466 U.S. 522, 529 (1984). These immunities are carefully designed to protect the *core* official duties of enacting legislation and deciding legal controversies. These common law immunities are applied in federal litigation involving state judges and legislators.

Federal litigation involving members of Congress requires courts to consider the case in light of the *absolute* immunity that emanates directly from the Speech or Debate Clause of the U.S. Constitution, Art. I, § 6, cl. 1. *See Kilbourn v. Thompson*, 103 U.S. 168, 201 (1880); *United States v. Johnson*, 383 U.S. 169, 180 (1966)[5]. This immunity is designed "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary". *Gravel v. United States*, 408 U.S. 606, 617 (1972). It should be noted that this immunity is rooted in a specific provision in Article I of the Constitution and it has no counterpart in Article II, which defines the scope of the president's authority. It is further worth noting that the one part of the Constitution in which the Founders bothered to carry out an explicit act of

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[5] The scope of this constitutional privilege is obviously broader than the one recognized under common law. *United States v. Gillock*, 445 U.S. 360, 366-367 (1980).

immunization, they did not extend it to *all* possible grounds for arresting a congressperson while he or she is discharging the duties of his or her office but rather, clarified that arrests were still allowed for "Treason, Felony and Breach of the Peace". This has been held to mean that this expression, as understood in English parliamentary immunity jurisprudence, "excepts from the operation of the privilege *all criminal offens*es". *Williamson v. United States*, 207 U.S. 425, 446 (1908) (emphasis added). Hence, the protection from "arrests" is restricted to civil proceedings as civil arrests were a common practice back when the clause was drafted. *Long v. Ansell*, 293 U.S. 76, 83 (1934). In this important regard, members of Congress enjoy the very same absolute immunity from civil liability that this Honorable Court found the president to have in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Since legislators clearly do not enjoy sweeping absolute immunity from criminal liability, this undercuts petitioner's argument that absolute civil immunity necessarily begets absolute criminal liability.

The above notwithstanding, the Speech or Debate Clause protect against criminal prosecution when legislative speech is implicated. For example, in *United States v. Johnson*, 383 U.S. 169 (1966), this Honorable Court held that the Speech and Debate Clause barred the prosecution of former House Member Thomas Francis Johnson (D-Md.) on certain conspiracy charges that involved the defendant's official legislative speech, explaining that:

> We hold that a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us.

> Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.

Id., at 184-185

Some years thereafter, the scope of the privilege was once again addressed when another democrat from Maryland, Senator Daniel Baugh Brewster Jr. successfully seized on the *Johnso*n holding to persuade the trial court to dismiss certain bribery counts asserted against him on the theory that they required that the intentions for his performance of protected legislative functions be questioned. In rejecting this thesis and allowing the prosecution to proceed, this Honorable Court held that "[t]he immunities of the Speech or Debate Clause *were not written into the Constitution simply for the personal or private benefit* of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators.". *United States v. Brewster*, 408 U.S. 501, 507 (1972). A crucial clarification included in the majority opinion and that is of particular importance to the instant case is that:

> In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process -- the *due* functioning of the process. Appellee's contention for a broader interpretation of the privilege draws essentially on the flavor of the rhetoric and the sweep of the language

> used by courts, not on the precise words used in any prior case, and surely not on the sense of those cases, fairly read.

Id., at 515-516 (emphasis in the original)

The above interpretation restricting the immunity expressly *written* into Article I to core legislative functions is quite different from the sweeping immunity that petitioner urges the Court to *infer* from Article II. As observed by the D.C. Circuit:

> The Constitution makes no mention of special presidential immunities. Indeed, *the Executive Branch generally is afforded none*. This silence cannot be ascribed to oversight. James Madison raised the question of Executive privileges during the Constitutional Convention, and Senators and Representatives enjoy an express, if limited, immunity from arrest, and an express privilege from inquiry concerning "Speech and Debate" on the floors of Congress. Lacking textual support, counsel for the President nonetheless would have us infer immunity from the President's political mandate, or from his vulnerability to impeachment, or from his broad discretionary powers. *These are invitations to refashion the Constitution, and we reject them*.

Nixon, 487 F.2d at 711 (emphasis added)

The indictment in this case alleges and the Government is required to prove that, in conspiring to defraud the United States, Mr. Trump "pushed officials in certain states to ignore the popular vote;

disenfranchise millions of voters; dismiss legitimate electors; and ultimately, cause the ascertainment of and voting by illegitimate electors in favor of the Defendant"; "organized fraudulent slates of electors in seven targeted states (Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin), attempting to mimic the procedures that the legitimate electors were supposed to follow under the Constitution and other federal and state laws"; "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"; "attempted to enlist the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results"; and "[a]fter it became public on the afternoon of January 6 that the Vice President would not fraudulently alter the election results, a large and angry crowd— including many individuals whom the Defendant had deceived into believing the Vice President could and might change the election results— violently attacked the Capitol and halted the proceeding". *See* Joint Appendix, at 185-188.

The actions mentioned in the previous paragraph are far removed from the type of *official* actions that the president is expected to take in order to see

that the laws be faithfully executed. The president plays no constitutional or statutory role in the certification of election results or in the appointment of presidential electors, all of which is done by the several states. By the like token, the president has no role in the joint session of Congress in which the electoral votes are counted and certified nor on how the vice president directs said session, in his role as President of the Senate. The only common thread to the overt actions in furtherance of a conspiracy with which petitioner has been charged lies not with the exercise of the duties of that high office but on the *political* machinations of a defeated candidate, aimed at reverting an electoral loss. These actions are so political in nature that Mr. Trump filed and lost dozens of lawsuits in federal and state court raising his theories of purported fraud as an individual and as a candidate, not as president.

The *Nixon v. Fitzgerald*, *supra*, civil immunity decision from which Mr. Trump attempts to draw substantial support involved an action that is completely unrelated to any election results and that instead fits comfortably in what a president is expected to do: approving the employment termination of an Air Force analyst. *Fitzgerald,* 457 U.S. at 733-738. It is impossible for the petitioner to place the actions charged in this case with the "outer perimeter" of presidential duties as that term is employed by the Court in that case. *Id*., at 756. Even though the Court limited its holding regarding presidential immunity to civil litigation, Justice White, joined by three other dissenters, observed that a grant of "absolute immunity to the Office of the President, rather than to particular activities that the President might perform, places the President above the law", which was seen as "a reversion to

the old notion that the King can do no wrong", resulting in a legal rule that "clothes the Office of the President with sovereign immunity, placing it beyond the law". *Id.*, at 76-767 (White, J., dissenting). Although petitioner presents the finding of absolute civil immunity as a foregone conclusion that needs to be logically extended to the realm of criminal prosecution, the fact is that *Fitzgerald* was a contentious 5-4 ruling that featured passionate and very cogent arguments by the dissenting justices.

This Honorable Court has previously, in the context of congresspeople seeking immunity under the Speech or Debate Clause, refused to prevent prosecution over political activities, even where there may also be said that those activities also relate to legitimate legislative functions. Hence, while acknowledging that congressional functions have expanded to include "a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress", which "are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections", rendering them "*political in nature rather than legislative*", which led to the conclusion that "*it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause*". *Brewster*, 408 U.S. at 513 (emphasis added).

We respectfully fail to see how it is that those who make the law are not spared from prosecution arising from political matters but the one person who

oversees the enforcement of those laws is exempted from criminal prosecution when he or she uses the mighty power of the presidency to pursue his or her political goals.

Mr. Trump attempts to bolster his absolute immunity argument by inviting this Honorable Court to consider the fact that he is the first former President of the United States to be criminally indicted for crimes alleged to have been committed during his time in office as supportive of an inference that this is so because everyone has implicitly understood that such prosecutions are barred by the Constitution. This syllogism requires, not only that all federal prosecutors be presumed to be motivated to go after former presidents as a form of partisan revenge, but it also demands that all historical precedent -including that created by petitioner himself- be ignored.

Contrary to what the petitioner suggests, accountability for a president's criminal conduct has always been a concern. William Maclay, one of Pennsylvania's first two federal senators and chronicler of the First Congress, wrote in 1789 that:

> Suppose the President commits Murder in [the] Streets. Impeach him[?] But You can only remove him from Office on impeachment. Why When he is no longer President, You can indict him. But in the Mean While he runs away. But I will put another case. Suppose he continues his Murders daily, and neither houses are sitting to impeach him. Oh! the People would rise and restrain him. Very well

> You will allow the Mob to do what the legal Justice must abstain from[6].

Senator Maclay, a figure from the founding era, not only understood that post-presidency prosecutions are a given but, contrary to what the Nixon and Clinton Departments of Justice would go on to conclude, he understood ignoring the criminal behavior of a sitting president, would lead to civil unrest. Maclay's diaries have traditionally carried substantial persuasive authority and are often cited by legal scholars. *See Trump v. Vance*, 140 S. Ct. 2412, 2435 (2020) (Thomas, J., dissenting).

Not many presidents have been in a position in which they were suspected of having engaged in criminality while in office. Prior to plaintiff, the chief executive that came closest to facing criminal liability was the Thirty-seventh President, Richard Nixon. Clearly, neither Nixon nor his successor Gerald R. Ford believed in anything remotely resembling petitioner's absolute immunity from prosecution, as in September 8, 1974, the latter issued a proclamation pardoning the former, noting that "*[a]s a result of certain acts or omissions occurring before his resignation from the Office of President, Richard Nixon has become liable to possible indictment and trial for offenses against the United States*" (emphasis added)[7]. In the case of *Harper & Row, Publishers, Inc. v. Nation*

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[6] William Maclay, The Diary of William Maclay, reprinted in *The Documentary History of the First Federal Congress of the United States of America: The Diary of William Maclay and other Notes on Senate Debates 1*, 168 (Kenneth R. Bowling & Helen E. Veit eds., 1988), as cited in Prakash, S.B., *Prosecuting and Punishing our Presidents*, 100 Tex. L. Rev. 55 (2021).

[7] https://catalog.archives.gov/id/299996?objectPage=2

Enterprises, 439 U.S. 539, 570-579 (1984), this Honorable Court attached as an appendix to the opinion, portions of an article that was published, containing the inner workings and deliberations that led to the adoption of the language that finally went into the pardon document. The acceptance of a presidential pardon is not without consequence, as it "carries an imputation of guilt; acceptance a confession of it". *Burdick v. United States*, 236 U.S. 79, 94 (1915). In other words, Nixon accepted the pardon because he understood that he would otherwise remain in criminal jeopardy for his conduct surrounding the Watergate scandal.

A couple of decades later, the Forty-second President of the United States, William J. Clinton also faced possible prosecution, in his case for perjury. Unlike Nixon, President Clinton was impeached, tried and eventually acquitted by the Senate. On January 19, 2001, his very final day in office, he struck a deal with federal Prosecutor Robert W. Wray, who agreed not to bring an indictment in exchange for the president admitting that he had lied under oath, along with agreeing to a 5-year suspension of his Arkansas law license and the payment of $25,000.00 in fines[8].

It is hard to believe that either of these men would have admitted having engaged in criminal conduct if they understood that they could not be subjected to prosecution. Both the Nixon and Clinton Justice Departments issued memoranda concluding

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[8] Steven Lubet, *Free Speech and Judicial Neutrality: A Response to Professor Freedman*, 37 Court Review 6 n. 1 (2001); https://www.washingtonpost.com/archive/politics/2001/01/20/in-a-deal-clinton-avoids-indictment/bb80cc4c-e72c-40c1-bb72-55b2b81c3065/

that presidents could not be criminally prosecuted *while still in office*. On October 16, 2000, Assistant Attorney General Randolph D. Moss wrote a memorandum reaffirming the conclusion reached by the Nixon administration back in 1973 to the effect that "the Constitution requires recognition of a presidential immunity from indictment and criminal prosecution *while the President is in office*" (emphasis added)[9]. This would be the most superfluous of distinction ever if, as Mr. Trump posits, immunity also attaches after the president has left office, in which case it would have sufficed to simply say that any criminal conduct in which a president engages simply may *never* be charged.

Petitioner was acquitted in his second Senate trial by a 57-43 vote, with all not guilty votes coming from the former president's own party. On the day of the vote, the leader for said party, Sen. Mitch McConnell (R-Ky.) clarified that his acquittal vote should not be understood to mean that he harbored any doubt regarding the former president's guilt but rather, that because he understood that a political conviction served no valuable purpose once Mr. Trump had left office, adding that petitioner could still be held accountable in civil and criminal actions. Leader McConnell now famous remarks included unambiguous assertions that on January 6, 2021, rioters violently breached the Capitol "because they had been fed wild falsehoods by the most powerful man on Earth — because he was angry he'd lost an election", which he deemed to be "a disgraceful dereliction of

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[9] https://www.justice.gov/olc/opinion/sitting-president%E2%80%99s-amenability-indictment-and-criminal-prosecution

duty", and for which he concluded that "[t]here is no question that President Trump is practically and morally responsible for provoking the events of that day", importantly adding that:

> *We have a criminal justice system in this country*. We have civil litigation. And *former Presidents are not immune from being held accountable by either one*. (emphasis added)[10]

It is not unreasonable to infer that, if Leader McConnell had not taken this position, it is very likely that the final tally could have included the ten additional votes that would have created the super-majority required for conviction.

The historical record thus shows that there is simply no such thing as a universal understanding that former presidents are absolutely immune from prosecution as Mr. Trump suggests in his brief.

It is also inappropriate to look into the fact that no prior ex-president had been indicted prior to 2023 from the assumption that everyone who held that office was similarly situated in terms of legal exposure. Petitioner is certainly entitled to be presumed innocent until otherwise proved by the Government, beyond a reasonable doubt in this case as well as in the other three criminal proceedings in which he has been charged. However, Mr. Trump's legal woes did not

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[10] 167 Cong. Rec. S736 (daily ed. Feb. 13, 2021), transcribed at https://www.republicanleader.senate.gov/newsroom/remarks/mcconnell-on-impeachment-disgraceful-dereliction-cannot-lead-senate-to-defy-our-own-constitutional-guardrails. As noted by the Court of Appeals in the instant case, 28 other senators offered process related reasons for voting to acquit. *United States v. Trump*, 91 F.4th 1173, 1204 (D.C. Cir. 2024).

start with the indictments that two federal and two state grand juries in four different states initiated.

While previous presidents have had their share of legal troubles, Mr. Trump is in a league of his own by any objective standard. Prior to the Trump presidency there had only been two successful presidential impeachment votes and they occurred 130 years apart[11], yet petitioner tied the amount of successful impeachment votes during the last two years of his only term. Petitioner had a class action certified against him for allegedly having defrauded the enrollees of "Trump University", an institution that was imputed with using "false advertising to lure prospective students to free investor workshops at which they were sold expensive three-day educational seminars" in which those in attendance "instead of receiving the promised training, attendees were aggressively encouraged to invest tens of thousands of dollars more in a so-called mentorship program that included resources, real estate guidance, and a host of other benefits, none of which ever materialized". *Low v. Trump Univ., LLC*, 881 F.3d 1111, 1113 (9th Cir. 2018). This case settled for $21,000,000.00 on December 16, 2016, which is about a month after petitioner was elected. *Id.*, at 1115-1116. On March 2019, Special Counsel and former Federal Bureau of Investigation, Robert S. Mueller, III, issued Volume II of his report regarding Mr. Trump's possible obstruction of justice while in office and, and at page 182 thereof, concluded that:

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11 President Andrew Johnson was impeached on February 24, 1868 and President Bill Clinton was impeached on December 19, 1998.

> The evidence we obtained about the President's actions and intent presents difficult issues that would need to be resolved if we were making a traditional prosecutorial judgment. At the same time, *if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, we are unable to reach that judgment. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him*. (emphasis added)[12]

With regards to proceedings arising from conduct that occurred before his time as president, Mr. Trump is also the only former commander in chief to have been civilly liable for sexual assault and defamation (two sperate judgments for defaming the same individual, while he was in office and after he left office) and fraud. *Carroll v. Trump*, 2023 U.S. Dist. LEXIS 157069 (S.D.N.Y. 2023); *Carroll v. Trump*, 2024 U.S. Dist. LEXIS 21663, at * 1-2 (S.D.N.Y. 2024)[13]. Petitioner was also subjected to a *civil* fine of hundreds of millions of dollars on several counts of fraud brought by the State of New York. *People v. Trump*, 2024 NYLJ 582 (N.Y. Sup. 2024); *People v. Trump*, 2024

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12 https://www.justice.gov/storage/report_volume2.pdf

13 These holdings are not yet final, as petitioner has exercised his right to appeal the matter.

NYLJ 711 (N.Y. Sup. 2024)[14]. Petitioner's namesake closely held company has been *criminally* liable for tax fraud. *Trump v. James*, 647 F. Supp. 3d 1292, 1298 (S.D. Fla. 2022) ("The Trump Organization has already been found guilty by a New York jury of several counts of tax fraud").

In order to avoid giving the impression that he seeks outright impunity for presidential criminal malfeasance, petitioner proposes that there is one pathway to criminal accountability, to wit: if the president is impeached by the House and convicted by the Senate, then he may be subsequently charged in a court of law. In the next section we shall demonstrate why there is absolutely no precedential, historical or practical support for making a criminal prosecution contingent upon a wholly political process.

B) IMPEACHMENT CANNOT BE A PREREQUISITE TO HOLDING A CRIMINAL PRESIDENT ACCOUNTABLE

Petitioner's creative argument involving impeachment revolves around U.S. Const. Art. I, § 3, cl. 7, which provides that:

> Judgment in Cases of Impeachment shall not extend further than to removal from 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.

This clause plainly clarifies that the scope of punishment in political impeachment and removal

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[14] This holding is also still on appeal.

proceedings is limited to removal from office and disqualification from future federal office, while clarifying that any further punishment may be handed down by the judiciary. For instance, in a case in which a president is impeached and removed for murder, the Senate's holding to the effect that such violation occurred cannot result in the imprisonment of the perpetrator, as the Sixth Amendment would entitle the president rights not available in the Senate trial, such as requiring proof beyond a reasonable doubt. In this hypothetical scenario, the removed president would have to be charged and tried in court, in order for him to face any punishment beyond the political sanctions imposed by a political body. However, Mr. Trump somehow reads the clause as *limiting* further punishment to those presidents convicted by a two-thirds majority of the U.S. Senate.

The constitutional provision at issue deals only with those who have been *convicted* by the Senate and does not purport to address the possible criminal exposure of those who have been acquitted. No president has ever been convicted by the Senate (only three have been tried) and no former president has been criminally charged after leaving office. This being the case, petitioner's contention that impeachment must precede any criminal indictment has never been raised by a former president. However, the issue has come up with regards to another officer subject to impeachment and removal, namely, a federal judge.

Otto Kerner, Jr., served as governor of Illinois until April 1968, when President Johnson appointed him to the U.S. Court of Appeals for the Seventh Circuit. A few years later Kerner was indicted for bribery, perjury and other felonies arising from his time as governor and during the subsequent investigation,

resulting in several convictions. *United States v. Isaacs*, 493 F.2d 1124, 1131-1132 (7th Cir. 1974) (per curiam), cert. denied at 417 U.S. 976 (1974). The convicted Judge Kerner argued that "provisions of Articles I and II of the Constitution relating to impeachment provide the only means of removing a judge from office, and, because conviction on criminal charges is tantamount to removal from office, federal courts are without jurisdiction over the person". *Id.*, at 1140-1141. This is essentially the same argument that Mr. Trump is making in the instant case. In dispatching this contention, the Court held that:

> The provision of Art. I, § 3, cl. 7, that an impeached person is "subject to Indictment, Trial, Judgment and Punishment, according to Law" *does not mean that the person may not be indicted and tried without impeachment first. The purpose of the phrase may be to assure that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy, or it may be to differentiate the provisions of the Constitution from the English practice of impeachment.*

Id., at 1142 (emphasis added)

To hold that a political conviction in the Senate is a *sine qua non* prerequisite for the criminal prosecution of a former president would create an ever-changing and limited list of possible crimes for which a chief executive may be held to account. This is so because impeachment is only possible for "Treason, Bribery, or other high Crimes and Misdemeanors". U.S. Const. Art. II, § 4. Treason and bribery are straightforward enough but the phrase "other high

crimes and misdemeanors" is notoriously opaque and ambiguous.

Scholars have been stumped by the term "other high crimes and misdemeanors", agreeing only on an amorphous severity standard of which Congress is the sole arbiter. *See e.g.* Laurence Tribe & Joshua Matz, *To End a Presidency: The Power of Impeachment*, at p. 42 (2018). President Ford, then a representative for the state of Michigan, who was promoting the ultimately unsuccessful impeachment of Justice William O. Douglas famously opined that an impeachable offense "is whatever a majority of the House of Representatives considers [it] to be at a given moment in history". 116 Cong. Rec. H3113-14 (1970) (statement of Rep. Gerald Ford). Hence, a president may incur in conduct that may be a crime under federal law but may escape accountability because a particular Congressional majority does not think that the transgression rises to the level of an impeachable offense. A future Congresses may hold a contrary opinion and impeach and convict another president who engages in the same conduct, exposing him or her to criminal prosecution while his or her predecessor enjoys immunity because of what a past Congressional majority understood at the time. This goes against "the need for uniformity and consistency of federal criminal law" that this Honorable Court has noted as an important concern. *Taflin v. Levitt*, 493 U.S. 455, 465 (1990).

Since the House has the sole power of impeachment, that political body may very well decide not to start impeachment proceedings against a president who has engaged in criminal conduct. If that action was to have the effect of barring a future criminal prosecution, the House would be issuing a pardon of sorts, as it would be limiting the authority of

prosecutors to charge that crime and the courts from entertaining such charge. This would usurp Article II prerogatives. There is no indication that the Founders intended for Congress to have any role in deciding if a person should be prosecuted.

There are many other problems with the argument that petitioner attempts to build around the Impeachment Judgment Clause. For instance, the moment of the oral argument held by the D.C. Circuit in the instant case that generated the most discussion was when Judge Pan asked Mr. Trump's attorney if a president could order Seal Team Six to assassinate a political rival and be free from prosecution if he or she is not first impeached and convicted, a query that was answered in the affirmative. This being the type of immunity that petitioner is advocating, what is to stop such a lawless president from using federal law enforcement to intimidate congresspeople or from downright laying the Capitol under siege if impeachment proceedings are commenced?

There is also the matter of whether a rogue president may escape criminal liability by *resigning* as soon as impeachment proceedings are started. As previously stated, Leader McConnell and other members of the republican caucus in the Senate voted to acquit the petitioner in his second impeachment on the grounds that the removal trial occurred after the current president had taken office, thereby mooting the whole political process. So strong was this believe within the republican delegation that the issue was put to a vote on a motion to dismiss promoted by Senator Rand Paul (R-Ky.), which was defeated by a 55-45 vote. *See* Michael W. McConnell, *Impeachment and Trial After Officials Leave Office*, 87 Mo. L. Rev. 793, 797-798 (2022) (discussing Senator Paul's

arguments and the final tally of the vote). The 55 senators that voted against this motion (all 48 democrats, 2 independents and 5 republicans) understood that while a conviction could no longer result in Trump's removal from office, disqualification from future office was a punishment that was still applicable. Lack of authority to sanction a former president was also the very first argument that Mr. Trump's defense memorandum raised at pages 10-23[15]. In other words, petitioner has already officially argued that a president's exposure to the political sanctions removal and disqualification may only be imposed during that person's presidency.

There will likely never be any judicial precedent definitively settling the question of the validity of impeachments and/or conviction of former presidents as, the fact that under U.S. Const. Art. I, § 3, Cl 6, the Senate holds the "sole" power of holding impeachment trials makes this the quintessential political question that is not justiciable under Article III. *See Nixon v. United States*, 506 U.S. 224, 229 (1993) (finding that "the word 'sole' indicates that this authority is reposed in the Senate and nowhere else"). This Honorable Court could have not been any clearer in that announcing that "*[j]udicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the 'important constitutional check' placed on the Judiciary by the Framers*". *Id.*, at 255 (emphasis added). This being the case, the proposed narrow exception for holding a criminal president to account that is being promoted by Mr. Trump may very likely

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15 https://www.usnews.com/news/politics/articles/2021-02-08/read-trumps-legal-defense-for-second-impeachment-trial

be evaded by a timely resignation or by committing crimes so late into his or her term that she or she is able to run the clock on impeachment and removal.

Notwithstanding the above problems with petitioner's argument, the best reason to reject the proposition that impeachment and Senate conviction are prerequisites for a subsequent criminal prosecution of a former president is that it subjects criminal liability entirely to *political* considerations. The House and the Senate enjoy an express constitutional grant of the *sole* power of impeachment and of impeachment trials respectively. The Legislative Branch is, as a whole, the most political of all three components of the republic. All members of Congress arrive at their positions through the political process and raw partisanship determines who holds leadership positions during any given two-year term. Congress, like all democratic parliamentary bodies, is a collective of *politicians* who make *political decisions* based on *political considerations*. The Legislative Branch is the only department of the government in which political partisanship is not only tolerated but also expected. There is no legal authority imposing any limitation on representatives and senators relying on purely partisan considerations as the basis for voting on any matter, including impeachment and impeachment trials.

Under petitioner's theory, a former president's exposure to criminal lability may very well be hitched to his or her political support from those members of Congress that support his or her political views. Because Senate conviction requires a two-thirds supermajority, the imperiled president does not necessarily need for his or her party to hold a parliamentary majority, as a modicum of political support would

generally suffice to stave off conviction. The historical record supports this thesis.

The very first and lengthiest impeachment trial of a president occurred from March 5, 1868 until May 26, 1868 and sought the removal of Andrew Johnson, who was elevated to that office after the Lincoln assassination. From a political standpoint, the Senate that held a political trial on the articles of impeachment passed by the House against President Johnson was overwhelmingly republican (as was the president) since only 27 states were represented with the 10 former confederate states still having their Senate representation suspended because of rebellion. Johnson escaped removal by a single vote as 35 members voted for conviction (36 was the two-thirds threshold at the time) and 19 voted to acquit. The articles of impeachment nominally revolved around the dismissal of the Secretary of War, in violation of the "Tenure in Office Act", which we now know to be an unconstitutional limitation of presidential power. However, the underlying political controversy was between those pushing for a more draconian approach to reconstruction, along with broader rights for freed slaves and those who would have preferred a less drastic approach on both issues. The first group was represented by so-called "radical republicans" and the latter by "moderate republicans" and by democrats. President's Johnson's executive actions were seen by many as soft on the former rebel states and therefore radical republicans were the moving force behind impeachment. Along those political lines, all 9 democrats and 10 moderate republicans voted to acquit and narrowly spared Johnson from conviction[16]. Clearly President

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16 *Ross, Edmund G. (1896). History of the Impeachment of Andrew Johnson, President of The United States By The House Of*

Johnson secured acquittal by consolidating the votes of those senators that were in line with his policies.

By the time President Clinton's impeachment trial occurred, American politics were already divided along the republican/democrat ideological lines that current generations are familiar with. With a 100 member Senate, 67 votes were needed to convict President Clinton in either of the two articles of impeachment approved by the House. *Every single Senate democrat* (45 in total) voted to acquit, resulting in a 45-55 vote on count 1 (in which 10 republicans voted to acquit) and a 50-50 vote in count 2 (in which only 5 republicans voted to exonerate the democratic president)[17]. Once again, the president's political allies voted overwhelmingly (in this case, unanimously) for acquittal.

On President Trump's first impeachment trial, held in early 2020, *all 53 Senate republicans voted to acquit* on count 2 and only Senator Mitt Romney (R-Utah) voted to convict on count 1, with the remaining 52 republicans voting to also acquit on that count[18]. The partisan divide in this political trial could not be any plainer as all 47 democrats (this includes 45

Representatives and His Trial by The Senate for High Crimes and Misdemeanors in Office 1868 (PDF). pp. 105–108.; https://memory.loc.gov/cgi-bin/ampage?collId=llsj&fileName=061/llsj061.db&recNum=942&itemLink=r?ammem/hlaw:@field(DOCID+@lit(sj061225)):%230610942&linkText=1

17 https://www.senate.gov/legislative/LIS/roll_call_votes/vote1061/vote_106_1_00017.htm?congress=106&session=1&vote=00017

18 https://www.govinfo.gov/content/pkg/CREC-2020-02-05/pdf/CREC-2020-02-05.pdf

registered democrats and independents from Maine and Vermont who caucus with democrats) voted to convict on both counts.

The second Trump impeachment trial, which took place a couple of weeks after he left office but was based on articles of impeachment that were adopted before the end of petitioner's term, once again featured all 50 democrats voting to convict and 43 out of 50 republicans voting to acquit[19]. Once again, partisan loyalty carried the day for the impeached president.

It has been a long time since any single party has held at last two thirds of the seats in the Senate. The last time that any party held the 60 votes required to bypass the Senate's undemocratic and anachronic filibuster rule was during the beginning of the Obama presidency and that edge was lost with the passing of Senator Ted Kennedy (D-Mass.) and the election of a republican to succeed him for the rest of the term. This is all to say that obtaining 67 votes in that chamber requires a significant bipartisan effort, something that definitely did not happened in the only four impeachment proceedings that have ever occurred.

We have not been able to find any record of any senator that participated in any of these four impeachment trials in which it is expressed that he or she considered the president's future criminal exposure as an element that weighed in his or her final decision on a vote. The same holds true for the main players in the trial proceedings themselves, as there is no record of House Impeachment Managers seeking

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19 https://www.senate.gov/legislative/LIS/roll_call_votes/vote1171/vote_117_1_00059.htm

a Senate conviction arguing that it is at least partially doing so to enable a future prosecution, nor has the defense of an impeached president ever pleaded with senator for acquittal as a means to avoid future criminal exposure. This being the case, petitioner's argument that a political conviction is required to charge a former president is held together only by wishful thinking and creative thought.

Any criminal conviction in which it is established that the judge or a juror was, in any meaningful way moved by purely political considerations would be swiftly vacated by the courts. It necessarily follows that, contrary to what Mr. Trump posits, limiting a former president's criminal exposure to those instances in which he or she is unlucky enough to be impeached and later unable to garner the modest political support required to avoid losing a Senate vote by two thirds would indeed place former presidents in a category of privilege that is traditionally associated with a monarchy or with other autocratic forms of government. As expressed in Thomas Paine's 1776 pamphlet "Common Sense", "in America the law is king" and, consequently "[f]or as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other".

The appearing *amicus* is a proud legislative body and a staunch defender of legislative prerogatives, including the power of indictment. The Puerto Rico House of Representatives is also respectful of the executive's authority to enforce criminal law and of the judiciary's duty to adjudicate criminal trials. Honesty, respect for legal precedent and love for democracy compels us to vehemently urge this Honorable Court to find that impeachment and impeachment trials, as they are fashioned by the U.S. Constitution

have no bearing on future criminal proceedings against the person facing them, regardless of whether that person happened to at some time held the high office of President of the United States.

Respectfully submitted,

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