No. 23-939

In the Supreme Court of the United States

DONALD J. TRUMP, *Petitioner,*

v.

UNITED STATES

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

BRIEF OF STEPHEN R. McALLISTER AND SCOTT PAUL AS *AMICI CURIAE* SUPPORTING RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

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Amici are interested in this case because a principled and conservative jurisprudence requires fidelity to constitutional and statutory text, without resort to penumbras, emanations, or judicial policymaking when the text leads to results at odds with the approach a judge might otherwise prefer.

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici*, its members, and counsel, made a monetary contribution to the brief's preparation or submission.

SUMMARY

Amici agree with Respondent and the panel below regarding the question presented that Presidents, like all other citizens, are not immune from the consequences of violating federal criminal law. *Amici* take no position here on any potential legal questions antecedent or subsequent to the question presented. And they take no position on whether the facts and the law will ultimately result in conviction, acquittal, or dismissal on other grounds.

Amici write separately to emphasize how Petitioner's claims of immunity lack any basis in the Constitution's text. Indeed, Petitioner's claims flout this Court's repeated and recently enhanced emphasis on looking to the original meaning of such *text*, as interpreted by history and tradition, rather than relying on penumbras, emanations, reading between the lines, historical practices *not* incorporated into the text, or, ultimately, the policy preferences and balancing of judges imposed upon such Rorschach-like non-textual approaches.

It has been the decades-long project of conservative jurisprudence to get away from such subjective and malleable approaches to constitutional and statutory interpretation, and this case is not the place to backslide on such jurisprudential principles. Alleged violations of federal criminal law are not discretionary choices left to the President by the Constitution or statute. Even Presidents must be legally accountable for violations of the laws they are sworn to faithfully execute.

The Constitution itself provides no textual basis for Presidential immunity from federal criminal laws.

When Petitioner cites actual constitutional provisions, he either invokes the strained implications—penumbras and emanations, perhaps—of clauses that say nothing about immunity, or gets things exactly backwards. When it comes to text, reading is fundamental.

The mere vesting of executive authority says nothing about immunity when such authority is abused or exercised in violation of laws enacted pursuant to Congress' legislative authority. Nothing in the text suggests it is left to the discretion of the President to violate federal or constitutional commands and limitations. And nothing in the text precludes the executive branch from deciding whether to lawfully prosecute previous Presidential violations of the law in the federal courts.

The Impeachment and Impeachment Judgment Clauses likewise provide no immunity to Presidents and do not establish a condition precedent for prosecution. Indeed, the Impeachment Judgment Clause supports exactly the opposite conclusion, serving as a negation of any imagined double jeopardy constraints based on conviction by the Senate. In doing so it confirms that ordinary legal accountability against Presidents is the default legal regime that is not to be displaced regardless of the outcome of impeachment and trial.

Structural concerns and other provisions of the Constitution likewise do not support presidential immunity from federal criminal law. The mere delegation of power does not imply absolute discretion in its exercise, and other so-called structural arguments amount to little more than policy arguments regarding which courts are not the proper

arbiters. And, where the Constitution intended immunity for elected officials, it said so explicitly and with built-in limitations, such as in the Speech and Debate Clause, providing specific, but certainly not absolute, immunity to Senators and Representatives. The absence of a comparable provision for Presidents and other executive officers should be more than sufficient to dispose of Petitioner's claimed immunity.

Unable to point to any immunity provision in the Constitution itself, Petitioner relies on older precedent based upon the very methodologies now viewed as illegitimate. While others will discuss the finer points of this Court's past precedent and why it does not apply to this case, *Amici* here merely note that such precedent lacks any coherent textual basis and, at a minimum, should not be extended further.

Finally, this Court should resist any policy urges to invent immunities for the President and instead hold that the agent of the People charged with faithfully executing the laws is also subject to those self-same laws and will not be given a free pass out of fear for the consequences of applying the Constitution as written. If there is a problem with perceived risk to future Presidents, it is Congress, via legislation, that is best suited to strike that balance and provide any limited immunity it might deem appropriate. While there are legitimate differences of opinion regarding the proper balance between rule of law versus executive timidity, it is decidedly not the role of this Court to strike that balance.

Insofar as the Court insists on drawing lines, however, it should take a narrow view of what presidential conduct is "discretionary" and hold that even otherwise "official" conduct that violates federal

criminal law is *ultra vires* and hence neither discretionary nor immunized from the criminal consequences of such violation. Indeed, the constitutional command that a President "take Care that the Laws be faithfully executed" provides as good a basis as any for holding, at a minimum, that intentional or reckless violations of federal criminal laws are not part of the "faithful[]" execution of the laws and not entitled to immunity. The alternative proposed by Petitioner would lead to absurd results or subjective and policy-driven judicial determinations of what conduct goes too far beyond the "outer bounds" of official action.

ARGUMENT

I. Presidential Immunity from the Commands and Consequences of Federal Law Must Be Based on the Original Public Meaning of the Text of the Constitution, Understood in Light of Its History and Tradition.

This Court's recent jurisprudence has been at pains to reemphasize that legitimate constitutional rulings must derive from the original public meaning of the text of the Constitution, not from penumbras, emanations, or other Rorschach-test manifestations of the policy views of the judicial branch. Recent cases re-focus on the text of the Constitution and the history and tradition that gave meaning to the words at the time they were adopted. See *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 235 (2022) ("Constitutional analysis must begin with 'the language of the instrument,' *Gibbons* v. *Ogden*, 9 Wheat. 1, 186-189, 6 L.Ed. 23 (1824), which offers a 'fixed standard' for ascertaining what our founding document means, 1 J. Story, Commentaries on the

Constitution of the United States § 399, p. 383 (1833)."); *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 22-25 (2022) (applying the text of the Second Amendment and looking to history and tradition to evaluate any claimed limits on the scope of such textual commands); *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 536 (2022) ("An analysis focused on original meaning and history, this Court has stressed, has long represented the rule[.]").

The complement to this textual emphasis is a rejection of nebulous claims of constitutional commands in the ether—or of squinting hard to find things that are not there. See *Dobbs*, 597 U.S. at 332 n.* (2022) (THOMAS, J., concurring) (noting the "facial absurdity of *Griswold*'s penumbral argument"); *United States* v. *Arthrex, Inc.*, 594 U.S. 1, 58 (2021) (THOMAS, J., dissenting, joined by Breyer, Sotomayor, and Kagan, J.J.) ("I would not be so quick to stare deeply into the penumbras of the Clauses to identify new structural limitations" from the Appointments or Vesting Clauses).

Indeed, this Court has regularly criticized more free-wheeling approaches as inappropriate judicial policymaking. See *Dobbs*, 597 U.S. at 240 (failure to interpret constitutional text according to history and tradition leads to the "freewheeling judicial policymaking that characterized discredited decisions such as *Lochner* * * *. The Court must not fall prey to such an unprincipled approach.").

Just as policy, preference, or evolving practice and circumstance will not be allowed to functionally delete constitutional text, nor can it be allowed to blue-pencil in further requirements that are not there. Compare *Bruen*, 597 U.S. at 22-23, 33, 36 (cannot ignore text of

Second Amendment), with *Dobbs*, 597 U.S. at 235, 300 (cannot add protections to the Constitution that are not supported by the text). Presidential immunity from the very laws he is tasked with faithfully executing is not provided by the Constitution. Whether such immunity is good policy or bad, where the lines should be drawn, and other such questions are not the purview of this Court. If Congress wishes to amend its laws to exempt Presidents from compliance, it presumably can do so, subject to any other constitutional constraints on the legislative power. But there is no "dormant" immunity from legislation—and especially from criminal laws—and this Court should not invent such immunity or expand upon its previous forays into legislative policymaking.

A. The Text of the Constitution Does Not Create Presidential Immunity from Federal Law.

Nothing in the text of the Constitution grants Presidents immunity from federal law. Unlike the flawed readings, inferences, and emanations relied upon by Petitioner, when the Framers of the Constitution sought to provide immunity, they did so expressly. Article I, section 6, of the Constitution provides that "The Senators and Representatives * * * shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." U.S. Const. art. I, § 6.

Such immunity as the Constitution provides is not absolute but is limited to the specific facts and

circumstances deemed appropriate by the Framers, with "speech or Debate in either House" receiving the most protection from external consequences, whereas "Treason, Felony and Breach of the Peace" being exempted from any immunity at all and other crimes being given only limited immunity as to the time and place where arrests may occur.[2]

Petitioner, by contrast, seeks far broader immunity yet can point to no comparable clause in the Constitution that even provides the limited immunity given Senators and Representatives. Under ordinary principles of textual interpretation, the detailed provision of immunity as to some elected officials and the absence of any such textual immunity as to the President would be compelling evidence that such claimed immunity does not exist. *Jennings* v. *Rodriguez*, 583 U.S. 281, 300 (2018) ("express exception to detention implies that there are no *other*" exceptions) (citing Antonin Scalia & Bryan A. Garner, *Reading Law* 107 (2012) ("Negative–Implication Canon[:] The expression of one thing implies the

[2] The Eleventh Amendment similarly provides express immunity from the federal judicial power for States sued by "Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. This Court has, unfortunately, read more into that limited immunity than the text supports. See *Hans* v. *Louisiana*, 134 U.S. 1 (1890) (expanding Eleventh Amendment Immunity beyond the terms of the Amendment); see also John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 Yale L.J. 1663, 1670 (2004) (criticizing counter-textual interpretation of the Eleventh Amendment). That expansion would not likely survive *de novo* application of this Court's current methodological emphasis on text and a proper reticence toward judicial policymaking.

exclusion of others (*expressio unius est exclusio alterius*)). Given the express immunity the Framers plainly knew how to provide, the absence of express Presidential immunity from federal criminal law is compelling evidence that such immunity does not exist.

The few clauses misconstrued by Petitioner either say nothing about immunity or squarely support the opposite conclusion.

1. The Vesting Clause. Petitioner, at 10-16, relies initially on the Vesting Clause of Article II, § 1 of the Constitution, which provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1. Such "executive" power requires something to execute, with the objects being defined by the Constitution itself or the laws enacted by Congress. And, indeed, Section 3 of Article II specifically requires that the President "shall take Care that the Laws be faithfully executed." The notion that the constitutional command to "faithfully" execute the laws somehow provides immunity from those very laws seems like an oxymoron on its face. One cannot faithfully execute the law by violating the law, much less violating the law in its most serious and weighty form—enacted criminal prohibitions.

But assuming, arguendo, a plausible claim that two different portions of the law are in tension—a supposed constitutional delegation of absolute discretion versus a legislative limitation on such discretion, perhaps—there is ample precedent for dealing with such claimed conflicts of law and deciding which prevails: preemption doctrine. Under standard preemption doctrine addressing whether one law

supersedes another, courts have noted three species of preemption: express preemption, conflict preemption, and field preemption. *Virginia Uranium, Inc.* v. *Warren*, 587 U.S. --, 139 S. Ct. 1894, 1911-1912 (2019) (Ginsburg, J., concurring) (discussing three categories of federal preemption of state law). That approach can equally be applied to claims that one provision of federal or constitutional law preempts or supersedes another purportedly inferior provision of federal or constitutional law.

The first species, express preemption of federal criminal law (*i.e.*, express presidential immunity from federal criminal law) does not exist here. The third, field preemption of criminal law inferred from the mere delegation of presidential power, is questionable on its face, generally requires fully comprehensive regulation of the field at issue, and has been rejected as applied to other constitutional delegations of power. *Virginia Uranium*, 587 U.S. at --, 139 S. Ct. at 1912 (Ginsburg, J., concurring) (preemption when "'Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law.'" (citation omitted)); *National Pork Producers Council* v. *Ross*, 598 U.S. 356, 370 (2023) (rejecting broad dormant Commerce Clause claim and noting critiques of earlier dormant Commerce Clause cases as not based on text).

That leaves only a claim of conflict preemption. Such preemption occurs when it is impossible to comply with conflicting commands or when two commands logically contradict even if they are not impossible to satisfy simultaneously. *Virginia Uranium*, 587 U.S. at --, 139 S. Ct. at 1912 (Ginsburg, J., concurring) (actual conflict where cannot comply

with both requirements); *Merck Sharp & Dohme Corp.* v. *Albrecht*, 587 U.S. 299, 314 (2019) (conflict preemption based on impossibility, and the mere "'possibility of impossibility [is] not enough'" (citation omitted)); *Kansas* v. *Garcia*, 589 U.S. --, 140 S. Ct. 791, 808 (2020) (THOMAS, J., concurring, joined by GORSUCH, J.) ("'[F]ederal law pre-empts state law only if the two are in logical contradiction.'" (quoting *Albrecht*, 587 U.S. at 319 (THOMAS, J., concurring)).[3]

A claim of presidential immunity from a criminal prohibition is tantamount to a claim that the Constitution's delegation of certain executive powers conflicts with and preempts its delegation and the subsequent exercise of legislative powers and

[3] A more questionable form of conflict preemption is sometimes applied where a state law "creates an unacceptable 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Wyeth* v. *Levine*, 555 U.S. 555, 563-564 (2009) (citation omitted). Reliance on such nebulous and speculative "purposes and objectives: as the basis for preemption has been rightly criticized as non-textual and inappropriate. *Rutledge* v. *Pharm. Care Mgmt. Ass'n*, 592 U.S. 80, 92, 95 (2020) (THOMAS, J., concurring) (criticizing "purposes and objectives" preemption as having "veered from the text" of the relevant statutes being analyzed); *Kansas* v. *Garcia*, 589 U.S. at --, 140 S. Ct. at 808 (2020) (THOMAS, J., concurring (joined by GORSUCH, J.) ("The doctrine of 'purposes and objectives' pre-emption impermissibly rests on judicial guesswork about 'broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of federal law.'" (citation omitted)); *id*. ("I therefore cannot apply 'purposes and objectives' pre-emption doctrine, as it is contrary to the Supremacy Clause.") (footnote omitted)); *id*. ("the Court correctly distinguishes our 'purposes and objectives' precedents and does not engage in a '"freewheeling judicial inquiry into whether a state statute is in tension with federal objectives."'" (citations omitted)).

preempts the exercise of other executive powers by a successor President. But ordinary conflict preemption takes a narrow view of such preemption, with impossibility read narrowly. See *Albrecht*, 587 U.S. at 314 ("we have refused to find clear evidence of such impossibility where the laws of one sovereign permit an activity that the laws of the other sovereign restrict or even prohibit" (citing cases)). And it certainly would not extend to claims of merely chilling a President from approaching the line of illegality and hence being reluctant to act "boldly" in circumstances that test the limits of the criminal law.

Even assuming some potential conflict where criminal process initiated against a sitting President would interfere with the *current* execution of the duties of the presidency, such a conflict does not apply here. Prosecution did not commence until after Petitioner had left office, and hence it does not conflict with the current performance of the duties of office.[4] The claim that the mere threat of prosecution would deter future Presidents from performing the duties of

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[4] And even assuming that prosecution of a sitting President for alleged federal crimes interfered with his performance of his duties, the Constitution recognizes that Presidents may not always be capable of performing their duties and makes provision accordingly. See U.S. Const. art. I, § 1, cl. 6 ("In Case of the * * * Inability [of the President] to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President"). An "inability" to perform the duties of office, due to probable cause to believe a President has committed a federal crime and thus faces legal peril, does not upend the constitutional allocation of powers, it merely triggers a contingent allocation to the Vice President. Circumventing that constitutional process in the name of supposed field or conflict preemption is a distortion of the constitutional text.

office in the bold manner they might prefer (or in bold disregard of federal criminal law) is wild speculation. (What is certain, however, is that immunity for former Presidents will directly interfere with a sitting President's authority to faithfully execute federal criminal law.) In any event, deterring Presidents from committing federal felonies seems like a feature, not a bug. But feature or bug, that is a policy question not to be asked or answered by this Court absent some text in the Constitution requiring it to do so.

Because the mere vesting of authority to execute the laws does not expressly or logically confer absolute discretion in the President to violate such laws, there would be no conflict preemption between Congress' authority to enact general criminal laws and the President's authority and obligation to "faithfully" execute those and other laws.

2. <u>The Impeachment Clause</u>. The other textual provisions relied upon by Petitioner involve impeachment and the supposed implications of that Congressional power and its consequences. Pet. Br. 16-22. The executive branch Impeachment Clause provides that "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. II, § 4. The Impeachment Judgment Clause further 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." U.S. Const. art. I, § 3, cl. 7.

Petitioner would read the latter Clause as setting a condition precedent for subsequent liability. Pet. Br. 16 ("By specifying that *only* the 'Party convicted' may be subject to criminal prosecution, the Clause dictates the President cannot be prosecuted unless he is first impeached and convicted by the Senate." (emphasis added)). But, as always, reading is fundamental, and even a cursory glance at the constitutional text belies any claim of a condition precedent. Nowhere is the word "only" found in the Impeachment Judgment Clause. Nowhere does it say that absent conviction the President or other officer impeached may not be subject to indictment, trial, judgment, and punishment.

Rather, the plain reading of the Clause indicates that impeachment and conviction themselves have only limited consequences—removal and disqualification—but *do not preclude* other available consequences for the underlying conduct itself. It is quite plainly written as a negation of any inferred double jeopardy bar given the language of "conviction," thus making clear that conviction on impeachment "nevertheless" does not provide immunity for the otherwise ordinary consequences of felonious conduct. Nothing in the language "presupposes that an unimpeached and un-convicted President is immune from prosecution." Pet. Br. 17. Indeed, it presupposes the exact opposite—that even conviction by the Senate would not *preclude* indictment, trial, etc. Petitioner's reading would effectively turn an "also"—"may nevertheless be liable"—into an "only." But the Clause only limits the direct legal consequences of conviction

by the Senate, not the preexisting and potential future consequences from other legal processes.

Even the passage from Alexander Hamilton cited by Petitioner, at 17, confirms this anti-immunity reading of that Clause. Hamilton wrote that:

> The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law.

The Federalist No. 65, at 440 (Easton Press ed. 1979) (Hamilton).

The punishment and consequence to which Hamilton initially refers is the removal from office, bar from future offices, and the shame and ignominy of having been impeached and convicted. But Hamilton then says that, even after such dire consequences, the impeached person will "*still* be liable to prosecution and punishment in the ordinary course of law." *Id.* (emphasis added). That description perfectly comports with the anti-double-jeopardy function reflected in the actual language and confirms that the preexisting state of jeopardy to prosecution and punishment still remains, *notwithstanding* the separate consequences of conviction by the Senate. That later statements in The Federalist Nos. 69 and 77 refer to prosecutions that could occur "afterwards" or "subsequent" to conviction by the Senate, Pet. Br. 18, is consistent with an anti-double-jeopardy reading of the Clause, at no time suggest that such

prosecutions may *only* occur after a conviction, and likely reflect the reality that "the ordinary course of the law" would take time or, equally likely, the fact that a sitting President would never be prosecuted by the very federal officers who answer to him. That prosecution for federal crimes would, as a practical matter, have to wait until a particular President left office (by Senate conviction or by expiration of term) and no longer controlled federal law enforcement, does not support the far broader claim that Senate conviction was a constitutional condition precedent for criminal prosecution.[5] A *former* President, however he came by such status, is subject to prosecution and conviction for federal crimes as both a practical statement of fact and as a legal principle absent some express immunity in the Constitution or laws.

Far from supporting an inference of immunity absent Senate conviction, the Impeachment Judgment Clause thus supports the exact opposite understanding of the existence of separate legal

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[5] Hamilton also viewed the separation of the adjudicators between the civil (impeachment) and criminal (prosecution and punishment) consequences of a crime to be for the benefit of the person impeached. The Federalist No. 65, at 440 ("Would it be proper that the persons who had disposed of his fame, and his most valuable rights as a citizen, in one trial, should, in another trial, for the same offense, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend, that error, in the first sentence, would be the parent of error in the second sentence?"). That same concern, of course, applies equally to error in the acquittal of a of an impeached person (a political decision) not being allowed to predetermine the legal decision concerning whether a crime has been committed and the proper punishment therefor.

jeopardy for a President or other federal officials who violate criminal laws.[6]

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[6] Petitioner's interpretation also conflicts with what members of the Senate understood the Clause to mean, with Majority Leader McConnell voting *against* conviction precisely because he believed the Impeachment Clause did not apply to *former* office holders and that the issue was best left to the criminal justice system. *READ: McConnell Speech After Trump's Impeachment Trial Acquittal*, U.S. News & World Rep. (Feb. 14, 2021) ("Impeachment, conviction, and removal are a specific intra-governmental safety valve. It is not the criminal justice system, where individual accountability is the paramount goal. * * * Indeed, Justice Story specifically reminded that while former officials were not eligible for impeachment or conviction, they were – and this is extremely important – 'still liable to be tried and punished in the ordinary tribunals of justice.' * * * 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."), https://tinyurl.com/mhxh2sns.

But one simply cannot have it both ways. If the Impeachment Clause does not allow conviction of Presidents after they have left office, even for conduct while in office, then it likewise cannot insulate such former office holders, now private citizens, from criminal prosecution, even for past acts while in office. If the Impeachment Clause were both inoperative as to former officeholders and yet still a prerequisite to criminal accountability, then any criminality engaged in near, or discovered after, the end of office would be completely immune, not merely contingently so.

And, of course, there is the debate about whether a President can pardon himself, meaning that if illegal conduct aimed at usurping an election were successful, the illegitimate office holder could then, prior to conviction by the Senate, pardon himself for the crimes that accreted the power in the first place. Relying on impeachment as a gatekeeper for criminal responsibility not only contradicts the actual text, it offers only an illusory remedy at best.

3. <u>The "Structure" of the Constitution</u>. Resort to the structure of the Constitution, or abstract claims of separation of powers, likewise do not support immunity. As an initial matter, claimed structural powers or immunities must still be based on the text of the Constitution, and the mere vesting of certain powers in the President does not imply that the exercise of such powers is not subject to the rule of law or the consequences for violating the law. Indeed, the Constitution itself constrains the conduct of Presidents and other officers, for example, in prohibiting them from accepting, without the consent of Congress, "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. It would be peculiar, to say the least, that a President would be immune from a federal law enforcing that constitutional constraint. And there is no principled basis for line drawing where Congress exercises other legislative authority to make certain acts criminal.

Furthermore, the "structure" of the Constitution can often be the equivalent of an inkblot onto which judges read what they want to read. Some will emphasize separation, some will emphasize legislative supremacy, some will emphasize states' rights, and some will emphasize the value of a bold presidency, right up until political fortunes change and litigants and jurists see fit to emphasize something else. To leave constitutional interpretation to such hazy and subjective multi-valent tests is no better than the broad purposivism decried by many on this Court in the statutory context. *Garcia*, 589 U.S. at --, 140 S. Ct. at 808 (THOMAS, J., concurring, joined by GORSUCH, J.) (criticizing analysis of a statute's "purposes and

objectives" as involving "freewheeling judicial inquiry" and "atextual speculation about legislative intentions"); *Murphy* v. *National Collegiate Athletic Ass'n*, 584 U.S. 453, 490 (2018) (THOMAS, J., concurring) ("Because we have "'a Government of laws, not of men,'" we are governed by 'legislated text,' not 'legislators' intentions'—and especially not legislators' *hypothetical* intentions." (quoting Justice Scalia dissent) (citation omitted)).

If we have learned anything from the past decades of jurisprudential analysis, it is that most documents have multiple and often conflicting purposes, are the product of compromise, not Kantian principle, and that the best way of knowing what a document intended to include or exclude is the text of that document and the original public meaning of the words used. If constitutional "structure" is to carry the day, then certainly any meaning read into that structure must give great weight to the textual context of express immunity provisions for Senators and Representatives and the absence of any comparable express immunity for Presidents. To resort to overarching "purpose" or "structure" to add or subtract from the text of a statute or the Constitution, or to emphasize or diminish one or another conflicting purpose, is a resetting of the constitutional and legislative compromises struck, and a task for which this Court is unsuited and unauthorized.

B. Past Immunity Cases Are Not Based on the Text of the Constitution.

Absent direct textual support for immunity in the Constitution, Petitioner is left to focus primarily on past cases addressing limited instances of presidential immunity or circumstances involving truly

discretionary functions of a President. Pet. Br. 10-24. Those cases are unnervingly short on textual analysis of the Constitution and long on policy discussions about what would be a desirable answer.

Regarding the cases cited by Petitioner. *Amici* leave it to Respondent and others to address the finer points and limitations of those cases. They note only that such cases lack textual basis for their various immunities and should be limited to situations where the Constitution, at a minimum, grants express discretion to the President that cannot be constrained by law. Compare U.S. Const. art. II, § 3 (President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures *as he shall judge necessary and expedient*" (emphasis added)), with *id.* (President "shall take Care that the Laws be faithfully executed"), and *id.* § 2, cl. 2 ("Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments").

Insofar as faithfully executing the laws is, by definition, constrained by such laws themselves, it is hard to imagine that violating federal criminal laws could fall within the absolute discretion of a President and hence be immunized. Suggestions to the contrary typically turn on the Court's views regarding prior common-law as applied to Kings, not Presidents, and considerations of "'public policy and convenience.'" *Nixon* v. *Fitzgerald*, 457 U.S. 731, 744-745 (1982) (citation omitted); see also *id.* at 748 ("Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our

constitutional heritage and structure. Historical inquiry thus merges almost at its inception with the kind of "public policy" analysis appropriately undertaken by a federal court."); *Trump* v. *Vance*, 591 U.S. 786, 140 S. Ct. 2412, 2426 (2020) (in discussing state-law subpoena power against a President, court addressed the perceived consequences of liability and similar public policy arguments without specific constitutional text beyond general reference to Article II and claimed necessity for the proper functioning of the government); *cf. Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 165-166 (1803) (discussing Presidential authority regarding discretionary "political" decisions and limiting analysis to "cases in which the executive possesses a constitutional or legal discretion").

Policy-driven incredulity at the absence of immunity, and resort to the supposed importation of common law to grant Presidents the immunities of Kings, *Nixon*, 457 U.S. at 746, is a stretch, to say the least. *Collins* v. *Virginia*, 584 U.S. 586, 607-608 (2018) (THOMAS, J., concurring) (other than a few limited "narrow enclaves" of judicial lawmaking authority that are either delegated "from the Constitution or a federal statute," or otherwise "questionable" in their preemptive force, "'the general rule is that '[t]here is no federal general common law'") (quoting *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64, 78 (1938). But even so, it is one thing to allow such untethered judicial policymaking to override a President's individual civil liability for official conduct, it is quite a different matter to deem such non-textual judicial policy-making sufficient to override federal criminal law.

At least one member of this Court has questioned the foundations of even qualified immunity. See

Ziglar v. *Abbasi*, 582 U.S. 120, 159-60 (2017) (THOMAS, J., concurring in part and concurring in the judgment) ("Our qualified immunity precedents instead represent precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make."; "'We do not have a license to establish immunities from'" suits brought under the Act "'in the interests of what we judge to be sound public policy'"; "The Constitution assigns this kind of balancing to Congress, not the Courts." (citations omitted)); *Baxter* v. *Bracey*, 140 S. Ct. 1862, 1862-64 (2020) (THOMAS, J., dissenting from the denial of certiorari) ("The text of § 1983 "'ma[kes] no mention of defenses or immunities.'"; "the defense for good-faith official conduct appears to have been limited to authorized actions within the officer's jurisdiction. * * * An officer who acts unconstitutionally might therefore fall within the exception to a common-law good-faith defense." (citations omitted)). The similarly weak foundations of the absolute immunity from federal criminal law claimed here should give the entire Court pause before expanding upon past cases.

II. Policy Considerations and Line Drawing Are for Congress, Not this Court.

Given the required fidelity of the President to the "Law," the only real source of immunity must come from federal law itself. Whether that is in the form of an express immunity provision or in the form of ordinary statutory interpretation suggesting that a specific law does not apply to particular presidential conduct, this Court should not place its collective thumb on the scale or indulge its own policy preferences. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1,

6, 8 (1971) ("a legitimate Court must be controlled by principles exterior to the will of the Justice"; "Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications[.]").

As for where to draw any immunity lines, as asked by the question presented, such lines are not and should not be a function of immunity doctrine, but rather an ordinary function of statutory interpretation. There are ample rules of statutory interpretation that serve to reduce the risk of excessive or abusive prosecution. The rule of lenity serves both due process notice requirements and the separation of powers by requiring crimes to be defined by Congress, not the executive branch. *Cargill* v. *Garland*, 57 F.4th 447, 470-471 (5th Cir. 2023) (en banc), *cert. granted*, 144 S. Ct. 374 (2023); see also *id.* at 473 (Ho, J., concurring in part and concurring in the judgment) ("The rule of lenity rests on 'the principle that the power of punishment is vested in the legislative, not in the judicial department.' * * * The rule also ensures fair notice to citizens: 'To make the warning fair, * * * the line should be clear.'" (citations omitted)). Mens rea principles limit when innocent conduct can lead to criminal liability. *Staples* v. *United States*, 511 U.S. 600, 605 (1994) ("[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo–American criminal jurisprudence." (cleaned up)). Each of these would apply equally to a President or a pauper facing criminal charges. This Court should not make special

rules for Presidents where the Constitution or federal statutes do not provide such rules themselves.

The difficulty with any line drawing purporting to supersede interpretation of the relevant laws is that it will inevitably be an exercise in subjective judicial policymaking. What functions are discretionary and what others are constrained by law? Does the President ever have discretion to disobey the criminal law? The Constitution? Numerous examples readily illustrate the problem and demonstrate that Petitioner's claimed immunity for all official acts to the outer bounds of executive authority proves too much. Cf. *Dobbs*, 597 U.S. at 257 ("appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much. * * * Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like." (citation omitted)).

Even assuming immunity is limited to "official acts," much less encompasses the "outer bounds" of such acts, any President willing to commit a felony would be equally willing to claim it was an official act.

The simplest example is bribery. Were a President to accept an explicit bribe to perform an official act in a particular manner, even a discretionary act, that would presumably fall within Petitioner's claimed immunity. One billion dollars to the personal accounts of the President or his family to sell arms to country X? To lift sanctions on country Y? To prosecute a business competitor? To launch an air strike against a foreign political opponent? Even a clear *quid pro quo* for the performance of an official act presumably involves official conduct of the President. If it exceeds the bounds of such conduct, it is only because Congress

has made it a crime for government officials to take bribes. Either the bounds of official conduct are delimited by federal criminal law or a whole host of behavior is suddenly immunized. Any other lines adopted by this Court that are not based on the express text of the Constitution or federal statute amount to nothing more than judicial speculation or policymaking.

Other examples in the parade of horribles abound. In the example discussed at the D.C. Circuit, if the President, purporting to act in his capacity as Commander in Chief, ordered members of the military to execute a political rival, that would properly be understood as an illegal order violating the Constitution, any number of criminal statutes, and the Uniform Code of Military Justice. See Br. for Three Former Senior Military Officers and Executive Branch Officials as *Amici Curiae* Supporting Pet'r 4-13. But it would presumably remain an "official act," just an illegal one. While it is laudable and comforting that faithful members of the military would not obey such an illegal order, *id.* at 7, 9-10 not every soldier (or former soldier), might have such scruples.[7]

But even accepting that no member of the military would carry out such an order, what if the President carried it out himself? Simply shoot a rival under the pretense of military necessity or some other executive function and claim immunity. And, for good measure, shoot or threaten to shoot any Representative or

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[7] See Marshall Cohen, *1 in 10 defendants from US Capitol insurrection have military ties*, CNN (May 28, 2021) (veterans among those who attacked the Capitol and assaulted police officers), https://tinyurl.com/yc55f943.

Senator supporting an impeachment or conviction, and any judge or Justice who might rule against him, as in league with foreign powers or domestic enemies trying to undermine the Presidency. Cf. Kristen East, *Trump: I could 'shoot somebody' and I wouldn't lose voters*, Politico (Jan. 23, 2016), https://tinyurl.com/mrxxyckn. Surely the President has the power to order violence in a variety of circumstances—war, self-defense, defense of others, etc.—but the test of those circumstances needs to be the law, not the policy-driven preferences of judges defining what they would view as the "outer bounds" of presidential authority.

Similarly, and a bit closer to current events, what if the President, claiming that the Vice President was illegally conspiring in election fraud, *expressly* instructed a crowd to stop the Vice President *by any means possible*. See Ashley Parker et al., *How the rioters who stormed the Capitol came dangerously close to Pence*, Wash. Post (Jan. 15, 2021) (January 6 mob chanted of "Hang Mike Pence!" and came close to reaching the Vice President), https://tinyurl.com/4cuzwpeh.

While an *express* call for the murder of a Vice President, even one accused of violating the law, would seem to violate any variety of laws and due process principles, is it really beyond the "outer bounds" of the President's official acts, as contemplated by Petitioner? On Petitioner's theory, even a squarely illegal act can be within the bounds of a President's official conduct, and it is the criminal law, not the criminal conduct, that must yield.

Further compounding the problem, if a President is acting within the outer bounds of his authority and immune for criminal acts, it is hard to imagine a

cogent theory that would not equally immunize the President's subordinates acting at the direct command of the President. Thus, a presidential order to murder an opponent, a Member of Congress considering impeachment, a judge or Justice that might rule against him, or a witness in a case against him for pre-presidential conduct, if immune, might well be claimed to confer that same immunity on a subordinate carrying out the act. And, of course, the President also could pardon any subordinate for all illegal acts committed pursuant to his immunity-protected order.[8]

If the Court is looking for lines to draw, it should look no further than federal criminal law itself, and the neutral principles used to interpret such law for all citizens. The Court should take a narrow view of what Presidential conduct is "discretionary" and hold that even otherwise "official" conduct that violates federal criminal law is *ultra vires* and hence neither discretionary nor immunized.[9] Offering special solicitude for Presidents accused of federal crimes based on some form of implied immunity from the vesting of executive power lacks a textual basis in the Constitution and creates its own separation of powers problems by overriding the legislative power of Congress and the executive power of the subsequent

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[8] It is thus little comfort that some might refuse such orders. Many others have been and might be more than willing to carry out illegal acts in seeming fealty to a President.

[9] Article II's command that a President "take Care that the Laws be faithfully executed" provides as good a basis as any for holding, at a minimum, that intentional or reckless violations of federal criminal laws are not part of the "faithful[]" execution of the laws. U.S. Const. art. II, § 3.

President seeking faithfully to enforce such criminal laws. If the ordinary constraints on criminal prosecutions are thought to be inadequate protection for a President and hence a poor way of running the country, that is a legislative problem to be handled by Congress or via constitutional amendment.

Indeed, to the extent the Court is tempted to put a thumb on the scales via a clear statement rule or the like, such a rule would be a far more credible reason to *reject* any claimed immunity absent a clear statement in the Constitution or the laws. A President free to commit crimes with impunity is such a remarkable proposition that one should hesitate to infer it from mere ambiguity or from penumbras, emanations, policy arguments, or even perceived structural patterns in the Constitution.

CONCLUSION

The text of the Constitution makes no provision for presidential immunity from the requirements of federal law or the consequences of violating such laws. This Court should not manufacture such immunity, but instead should interpret the laws as they would for any other citizen, apply the laws as the facts require, and avoid any policy-based thumbs on the scale for Petitioner in this case or for Presidents in general. Because the D.C. Circuit reached the correct result in denying a claim of presidential immunity, this Court should affirm on the question presented.

Respectfully submitted,

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