No. 23-939

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR *AMICUS CURIAE* JEREMY BATES IN SUPPORT OF RESPONDENT

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Amicus Curiae *in support of Respondent The United States of America*

Question Presented

As limited by the Court, the question presented is this:

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

The Court should deem the foregoing question to comprise the following subsidiary questions that are fairly included therein:

2. Whether the President is a fiduciary.

3. If so, whether the President owes a heightened duty of obedience to the criminal law.

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Interests of *Amicus Curiae*[1]

As a lawyer, *amicus* has litigated alleged breaches of fiduciary duty in trusts, businesses and nonprofits. As a citizen, *amicus* has an interest in ensuring that the President take care that the laws are faithfully executed and that the President be deterred from using official power to commit crimes.

Summary of Argument

To contend that the President may commit official-act crimes with impunity is to misunderstand executive power, to disregard fiduciary duties, and to downplay presidential criminality.

The President is the Nation's chief executive. The Constitution vests a president with executive power. In receiving that power, the President swears to preserve, protect, and defend the Constitution and to take care that the laws will be faithfully executed. Thus a president is subordinate to the laws and must carry them out. The power to execute the laws is not in any way a license to violate them with impunity.

Even so, Petitioner Donald J. Trump argues he is immune. He focuses, self-servingly, on presidential authority. To be sure, courts respect the separation of powers; but a president is not the *capo di tutti capi*, and structurally, there is nothing legitimate here to separate. No branch has any power to violate the law. Powers are separated in order to secure liberty—to

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

establish justice and promote domestic tranquility, not to shelter fraud, permit deceit, or harbor violence.

So the dispositive principle here is not separation, but entrustment. A president holds executive power as a public trust. She serves as a public fiduciary. She owes a duty not only to "take Care that the Laws be faithfully executed," U.S. Const. Art. II § 3, but also to obey the laws herself, as an employee, agent, and officer of the United States.

Thus a president's duty to abide by the criminal law is heightened. It is an official duty of compliance. Anyone can commit a federal crime. Only a president can commit an official-act crime and, in so doing, flout a constitutional obligation to execute the laws, be faithless to an oath, and breach a fiduciary duty.

Moreover, the United States has an urgent interest in deterring presidents from committing crimes—especially official-act crimes against constitutionally mandated processes. A criminally minded president poses a critical danger to the Republic. A president is well placed to recruit executive officers—charged, like the President, with carrying out the laws—into plots to break the laws. That is how some presidential administrations become criminal conspiracies. We know from history that presidents can pressure Justice Department officials to pervert the course of justice and to conspire against the Constitution that they are all sworn to defend.

Organized crime is a menace. Corporate crime is perilous. Presidential crime is anathema.

The Court should affirm.

Argument

The question of immunity for official-act crimes is best answered by examining the presidential office, its duties, and its potential for abuse.

In so doing, the Court should bear in mind a letter that the first President, George Washington, sent the first Secretary of the Treasury, Alexander Hamilton. In his letter, Washington (i) adverted to legal limits on executive power, (ii) emphasized the President's sworn "duty to see the Laws executed" faithfully, and (iii) stressed that it would be "repugnant" to this duty for the laws "to be trampled upon with impunity":

> [I]f, notwithstanding [Hamilton's efforts to curb resistance to an excise tax], opposition is still given to the due execution of the Law, I have no hesitation in declaring… that *I shall... exert all the legal powers with which the Executive is invested*, to check so daring & unwarrantable a spirit. *It is my duty to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to it*; nor can the Government longer remain a passive spectator of the contempt with which they are treated.

Letter, G. Washington to A. Hamilton (Sept. 7, 1792), https://founders.archives.gov/documents/Washington/05-11-02-0040 (visited April 4, 2024) (italics added).

No longer indeed. It is time for this Court to clarify basic principles of executive power—principles that the Founders knew full well, but that Trump would trample upon with impunity.

I. The President is a fiduciary.

The word "Trust"—always capitalized—appears four times in the 1787 Constitution. Every time, it is used to describe "Office[s]" under the United States.[2] These references to Offices of Trust logically must include the presidency. Otherwise these clauses—the Impeachment-Judgment, the Foreign-Emoluments, the Electors-Appointment, and the Religious-Test Clauses—would all be subject, incongruously, to presidential exceptions.

Because the Constitution frames the presidency as an Office of Trust, the President holds a public trust, with powers exercisable in the interests of those who created the office and confer the trust: the People.

That the presidency is a trust has key implications here. The implications are familiar from case law.

Two lines of cases generally establish that public officials are fiduciaries—and that they may be liable, civilly or criminally, if they violate their duties to the entities that employ them or to the public they serve.

The first line of cases is about protecting secrets.

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[2] U.S. Const. art. I, § 3, ¶ 7 ("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"); U.S. Const. art. I, § 9, ¶ 8 ("[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any [ ] Emolument… from any foreign State."); U.S. Const. art. II, § 1, ¶ 2 ("[N]o Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."); U.S. Const. art. VI, ¶ 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

When a CIA agent violated a duty to keep secrets, the Court held civilly that the agent had "breached a fiduciary obligation." *Snepp* v. *United States*, 444 U.S. 507, 510 (1980) (per curiam). In 1987 the Court repeated *Snepp*'s "traditional" rule that "'an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment.'" *Carpenter* v. *United States*, 484 U.S. 19, 27 (1987) (quoting *Snepp*, 444 U.S. at 515 n. 11).[3]

The second line of cases is about prosecuting fraud.

When the United States prosecuted a former governor of Maryland, the Fourth Circuit held that "[T]he Governor… is trustee for the citizens and the State… and thus owes the normal fiduciary duties of a trustee[,] e. g., honesty and loyalty." *United States* v. *Mandel*, 591 F.2d 1347, 1363 (4th Cir. 1979); *see also id*. at 1362 (describing governor's "fiduciary duties" of "honest, faithful and disinterested service").

Mandel may have turned implicitly on a provision in Maryland's post–Civil War constitution stating that government officials are "[t]rustees." Md. Const. Decl. of Rights art. 6 (1867) ("[A]ll persons invested with the Legislative or Executive powers of Government are the Trustees of the Public."). But only last month, the Court seemed to emphasize government as trusteeship in a case from California. *O'Connor-Ratcliff* v. *Garnier*, 601 U.S. __ (2024) (per curiam) (referring, eight times over two pages, to school-board members by their title, "Trustees").

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[3] The Second Circuit has held, at Petitioner's urging, that when he was the President, he was an employee. *Carroll* v. *Trump*, 49 F.4th 759, 772 (2d Cir. 2022) ("[W]e hold that the President is an employee of the government under the Westfall Act.").

Last year, this Court suggested that the rule that public officers are fiduciaries may also find its source in the common law of agency. "An 'agent owes a fiduciary obligation to the principal,'" and so "an agent of the government has a fiduciary duty to the government and thus to the public it serves." *Percoco* v. *United States*, 598 U.S. 319, 329, 329–30 (2023) (quoting 1 Restatement (3d) of Agency § 1.01, cmt. *e*, p. 23 (2005)) (government of New York).

And indeed, the principle that federal officers are fiduciaries is traditional. A century ago, prefiguring *Percoco*, this Court viewed public officials as agents:

> The larger interests of public justice will not tolerate… that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal without full disclosure, *it is a betrayal of his trust*….

United States v. *Carter*, 217 U.S. 286, 306 (1910) (italics added). This agency reasoning followed "from the fiduciary character" of the public office. *Id*. The *Carter* defendant was an agent, and thus a fiduciary, because at the time of his misconduct, he was "a captain in the Army of the United States." *Id*. at 297.[4]

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[4] Fiduciary language lately has been used to describe this Court and its employees. *Trump* v. *Mazars USA, LLP*, 591 U.S. 848, 862 (2020) (stating that "longstanding practice… imposes on us a duty of care"); *Statement of the Court Concerning Leak Investigation* 1 (Jan. 19, 2023) (terming leak "one of the worst breaches of trust" in Court's history and an "extraordinary betrayal of trust"); *Marshal's Report & Recommendations* 5

If these kinds of public servants—Army captains, State governors, CIA agents—are all fiduciaries, then the President of the United States is too. The office is national and singular, but this means only that the confidence placed in it by the People is weightier, the public trust administered is greater, and the damage caused by a breach of fiduciary duty may be wider.[5]

Here, the President's role as a fiduciary elucidates what the Court of Appeals called a "paradox" (JA39) in Trump's immunity argument. Trump says that a criminal president should be punished *less* than a criminal citizen: not at all. (Pet. Br. at 4.)

That argument is no paradox. It is merely wrong. And it is important to say why.

II. Fiduciaries owe heightened duties that include obedience to the criminal law.

The word "fiduciary" denotes a person who handles money or property for another's benefit and therefore, in many ways, resembles a trustee:

> The term is derived from the Roman law, and means (as a noun) a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. A person having duty,

(Jan. 19, 2023) (quoting Law Clerk Code of Conduct) ("The law clerk, like the Justices, holds a position of public trust.").

[5] For scholarly debate on whether the President is a fiduciary, *compare* Samuel Bray & Paul Miller, *Against Fiduciary Constitutionalism*, 106 Va. L. Rev. 1479 (2020), *with* Andrew Kent, Ethan Leib, & Jed Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111 (2019).

> created by his undertaking, to act primarily for another's benefit….
>
> A person or institution who manages money or property for another and *must exercise a standard of care in such management activity*….

Black's Dictionary 563 (5th ed. 1979) (italics added).

Because fiduciaries manage property for others, the law demands more of fiduciaries than it does of most people. The standard of conduct for fiduciaries is "at a level higher than that trodden by the crowd." *Meinhard* v. *Salmon*, 249 N.Y. 458, 464 (1928) (Cardozo, J.). This principle holds true across the law, though the details of the higher, fiduciary standard vary according to the specific role.

A. Trustees must obey the terms of the trust and must avoid self-dealing.

A trust is an arrangement where one person (the trustee) holds title to property for the benefit of another (the beneficiary). Thus a trustee is the paradigmatic example of a fiduciary. Famously, trustees are "held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard*, 249 N.Y. at 464.

Chief among the rules that the civil law applies to trustees is the duty of loyalty. This duty requires the trustee to administer the trust solely in the interests of the beneficiaries. The fiduciary must place the interests of the beneficiaries ahead of the fiduciary's own interests, as well as the interests of others. *See generally* Restatement (3d) of Trusts § 78; *accord*, *e.g.*, ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) ("[A]

fiduciary shall discharge his duties… solely in the interest of the participants and beneficiaries….").

As part of the duty of loyalty, a trustee must avoid self-dealing. If a trustee had a personal interest in a challenged transaction, then the trustee may be civilly liable. "[N]o matter how broad the exculpatory provision [in a trust instrument] may be, the trustee is liable if he commits a breach of trust in bad faith or intentionally or with reckless indifference to the interests of the beneficiaries, or if he has personally profited through a breach." *Matter of Posner*, 202 A.D.3d 492, 493 (1st Dep't 2022) (citing *Matter of Jastrzebski*, 97 A.D.3d 819, 820–21 (2d Dep't 2012)); *see also* Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 68 N.Y.U. L. Rev. 1045 (1991).

In New York, where the United States arguably was organized, "[a] trust may be created for any lawful purpose." N.Y. EPTL § 7-1.4 (McKinney). But a trust may not be used for illegal activity. After all, a trust is a "legal device" that provides for the use of property in a specific way. As a legal device, a trust "'comes within the ambit of our legal system'" and it "'cannot become a vehicle for illegal conduct or activity.'" *Papson* v. *Papson*, 1998 WL 1177948, *2 (Sup. Ct. N.Y. County July 31, 1998) (quoting *Matter of Sage*, 412 N.Y.S.2d 764, 769 (Surrogate's Ct. Albany County 1979)).

"A trust… cannot be soiled by any illegal use." *Sage*, 412 N.Y.S.2d at 769. Indeed, if the performance of a trust involves the commission of a crime, then the "trust may fail." *Id*. (citing Scott on Trusts, Vol. 1, § 60 (2d ed.)).

B. Corporate fiduciaries owe duties of oversight, supervision, and compliance.

In the business world, corporate directors, officers, and executives similarly manage property and money for the benefit of others. Such businesspeople therefore owe fiduciary duties as well. *See*, *e.g.*, *Malone* v. *Brincat*, 722 A.2d 5, 9 (Del. 1998) ("The board of directors has the legal responsibility to manage the business of a corporation for the benefit of its shareholder owners.").

Thus fiduciary-duty claims may exist against corporate fiduciaries for failing to supervise, or failing to establish procedures to control foreseeable risks.[6]

In particular, directors of Delaware corporations have a duty to comply with the law. And if a director knowingly breaks the law, which is evidence of bad faith, then the director cannot rely on the business-judgment rule or on any exculpation clause in the certificate of incorporation. Such a clause, after all, may not limit liability for "any breach of the director's duty of loyalty" or "for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law." DGCL § 107(b)(2).

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[6] *See In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.3d 959, 967 (Del. Ch. 1996); *see also In re The Boeing Company Deriv. Litig.*, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021) (airplane safety); *Hughes* v. *Hu*, C.A. No. 2019-0112-JTL, 2020 WL 1987029 (Del. Ch. Apr. 27, 2020) (financial reporting); *Inter-Marketing Group USA, Inc.* v. *Armstrong*, C.A. No. 2017-0030-TMR, 2020 WL 756965 (Del. Ch. Jan. 31, 2020) (oil-pipeline reliability); *In re Clovis Oncology Deriv. Litig.*, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019) (clinical trials for prescription drugs); *Marchand* v. *Barnhill*, 212 A.3d 805 (Del. 2019) (food safety).

These principles apply although businesses would boost their profits by breaking the law. *E.g.*, *Metro Commc'n Corp. BVI* v. *Adv. Mobilecomm Techs. Inc.*, 854 A.2d 121, 163 (Del. Ch. 2004) (finding former executives who "participated" in "bribery scheme" liable for breaching fiduciary duty of loyalty to LLC).

"Delaware law does not charter law breakers." *Lebanon Cnty. Employees' Ret. Fund* v. *Collis*, No. 22,2023, 2023 WL 8710107, at *13 (Del. Dec. 18, 2023) (cleaned up). Therefore, "[w]here a [Delaware] fiduciary acts with the intent to violate positive law, she runs afoul of this proscription and violates the duty of loyalty." *Id.* Like New York trusts, Delaware corporations may "only pursue 'lawful business' by 'lawful acts.'" *In re Massey Energy Co.*, No. CIV.A. 5430-VCS, 2011 WL 2176479, at *20 (Del. Ch. May 31, 2011), quoting 8 Del. C. §§ 101(b) & 102; *accord*, Model Bus. Corp. Act § 3.01(a) (updated April 2023) (corporation may engage in any lawful business).

So, for Delaware corporate fiduciaries, "there is no room to flout the law governing the corporation's affairs…. *[T]hey must act in good faith to ensure that the corporation tries to comply with its legal duties*." *Massey*, 2011 WL 2176479 at *21 (italics added). Delaware expects that "fiduciaries who operate entities will not knowingly cause the entities to breach the law." *Metro Commc'n*, 854 A.2d at 142. And there, in the First State, this fiduciary obligation "cannot be contracted away by private parties, since it involves an important public interest." *Id.*[7]

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[7] Delaware courts also reserve "enhanced judicial scrutiny" for fiduciaries' actions that "interfere[ ] with a corporate election or a stockholder's voting rights in contests for control." *Coster* v. *UIP Companies, Inc.*, 300 A.3d 656, 672 (Del. 2023).

C. Leaders of nonprofits owe duties of obedience to governing documents and the general law.

Given the private purposes of noncharitable trusts and the profit-making purposes of business entities, the best analogy to the duties of public fiduciaries may be the duties of nonprofit fiduciaries. For just as governments do, nonprofits have public purposes. (And again, nonprofits' purposes must be lawful. Revised Model Nonprofit Corp. Act § 3.01(a) (nonprofits are organized for lawful purposes).)

Explicit in the law of nonprofit organizations is the principle that directors are under a duty of obedience. This duty has two aspects: fealty to an organization's governing documents and obedience to external law.

Nonprofit board members have a duty to "carry out the purposes of the organization" as expressed in its organizational documents. James J. Fishman & Stephen Schwarz, *Nonprofit Organizations: Cases and Materials* 219 (3d ed. 2006). This duty of obedience "capture[s] the idea that a director is under an obligation to ensure that the corporation acts within its proper purpose and mission." Thomas Lee Hazen & Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 U. Pa. J. Bus. L. 347, 386–87 (2012).

For nonprofits, the duty of loyalty is not loyalty to the entity alone; it is loyalty to the organization's purposes. Restatement Charitable Nonprofit Orgs. § 2.02 (2021). Thus "a charity is organized to benefit, in the largest sense, the general public." *Id*.

Moreover, nonprofit fiduciaries owe a duty of care, which gives discretion to business judgment but also insists on good faith. The good-faith standard "necessarily excludes from the protection of the [business-judgment] rule a decisionmaker who commits fraud or another illegal act. Bad faith also includes egregious and unconscionable conduct, such as use of [a charity's] assets for illegal purposes." Restatement Charitable Nonprofit Orgs. § 2.03 (2021); *Manhattan Eye, Ear & Throat Hosp*. v. *Spitzer*, 715 N.Y.S.2d 575, 593 (Sup. Ct. N.Y. County 1999) (requiring good faith of hospital directors).

Under New York law governing nonprofit organizations, "Persons shall not be considered to be acting in good faith if they have knowledge concerning the matter in question" that would cause any purported reliance on advice to be "to be unwarranted." N.Y. Not-for-Profit Corp. Law § 717 (McKinney).

Federal law exculpates nonprofit volunteers unless the alleged harm was caused by "willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference" to the rights or safety of an individual harmed by the volunteer. 42 U.S.C. § 14503. So even in the nonprofit-volunteer context, the law does not tolerate criminality.

D. As a fiduciary, the President too is under a heightened duty to obey the law.

As shown above, stakeholders in private entities (trusts, businesses, and nonprofits) are protected by courts. Trust beneficiaries, corporate shareholders, and nonprofit members all have judicial protection against faithless fiduciaries. The rule of liability

varies, but it may require bad faith, recklessness, self-dealing, or a knowing violation of law.

The wisdom of civil law, developed over centuries, is that if people ordain or establish artificial entities, set aside resources, and create powers—whether for private, profit-making, or public purposes—then the entities and their stakeholders may demand a high standard of fiduciary conduct. In private law, a grant of power, authority, and resources to another carries with it a heightened duty of compliance.

The question here is whether the rule should be any different for the "nation's chief executive officer." *Kennedy for President Comm.* v. *F.C.C.*, 636 F.2d 432, 449 n. 147 (D.C. Cir. 1980).

The answer is that the rule should be much the same. If the President holds an Office of Trust, then the President must obey the trust terms. And a President's duties of obedience—to organizing documents and to external law—merge. The Republic's organizing documents are its Constitution and laws. So the duty is unitary.

To be sure, this reasoning is by analogy to private, civil liability. It may be objected that the standard for public, criminal liability should be different. Any such objection, however, must contend with (a) the reality that government crime is organized crime and (b) the consistent history of presidential criminality.

III. If a president's crimes involve official acts, then the crimes deserve more punishment.

Because the President is a fiduciary (*see* Part I, *supra*), and fiduciaries owe higher duties (*see* Part II, *supra*), the Court should now make clear that even the

President's official-act crimes may be punished, just as other forms of organized crime are punished.

A. Organized crime is punished because entity criminality is dangerous.

Official-act, presidential crime may be regarded as organized crime that has infiltrated the Executive.

Organized crime comprises the "unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services." Omnibus Crime Control and Safe Streets Act of 1968, § 601(b), Pub. L. 90-351, 82 Stat. 209. But nothing about it requires an illegitimate entity; RICO enterprises may include legal entities. *United States* v. *Turkette*, 452 U.S. 576, 580–93 (1981) (describing RICO's primary purpose as combating infiltration of legitimate entities); 18 U.S.C. § 1961(4) (defining "enterprise" to include any "partnership, corporation, association, or other legal entity").

Conspiracy, moreover, is a separate offense because "collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts." *Ianelli* v. *United States*, 420 U.S. 770, 778 (1975). When people conspire in private entities to commit crimes, the law reacts strongly because the use of an enterprise enables crime to be longer-lasting, more complex, and more ambitious. *Id*. The Court should now regard official-act, presidential crime with equal gravity.

B. Official-act, presidential crimes should be punished because they endanger the Republic.

Many considerations call for the conclusion that if the charged conduct is alleged to involve official acts, then any crime should not be excused, but punished.

If the charged conduct was official, then the defendant was acting not merely as a private citizen, subject to ordinary criminal liability, but as a public fiduciary under a heightened duty to obey the laws.

If the charged conduct included official acts, then the defendant allegedly used power and resources entrusted to the President for unlawful purposes.

If a charged conspiracy involved official acts, then the conspiracy likely extended to other officers, agencies, or departments of the United States.

If the charged conduct included official acts, then the alleged victims likely included the United States and its People. The United States is, in some sense, alleged here to be both culprit and victim.

But the United States cannot prosecute itself. It is a "long-recognized general principle that no person may sue himself." *United States* v. *I.C.C.*, 337 U.S. 426, 430 (1949). This is true for the United States. *Luckenbach Steamship Co.* v. *United States*, 315 F.2d 598, 604 (2d Cir. 1963) ("[T]he Government, no more than any other person, can sue itself.") (Friendly, J.). Besides, if executive power is unitary, delegated from the President, then the executive cannot prosecute the sitting Executive. And no one may punish the United States for official criminality by revoking its registration or suspending its license to do business.

Thus the way to achieve accountability, to deter further presidential crime, and to proclaim society's disappoval is to prosecute the individuals involved, including former presidents.

This is a governmental corollary to the principles that DOJ follows when it prosecutes corporate crime:

> Because a corporation can act only through individuals, holding individual wrongdoers criminally liable may provide the strongest deterrent against future corporate wrongdoing. *Provable individual criminal charges should be pursued, particularly if they implicate high-level corporate officers*, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation….

Federal Prosecution of Business Organizations, Justice Manual 9-28.210, at https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.210 (italics added).

To describe the White House or the Department of Justice in terms of principles for corporate crime may seem odd. History, however, counsels that it is necessary. History shows that faithless presidents appoint attorneys general who abet wrongdoing.

Fifty years ago, courts held to account the Nixon Administration's bad actors, including John Mitchell. *See United States* v. *Haldeman*, 559 F.2d 31, 51 (D.C. Cir. 1976) (affirming Mitchell's conviction as part of "unprecedented scandal at the highest levels of government"). Mitchell had joined the Watergate conspiracy while he was Attorney General. *Id*. at 52.

In the 1980s a prosecutor concluded that Attorney General Edwin Meese's "attempt to signal other

Cabinet members" that President Reagan had not known about illegal arms sales "required evaluation as an effort to obstruct a congressional inquiry." Lawrence E. Walsh, Final Report of the Independent Counsel for Iran/Contra Matters, 526, No. 86-6 (D.C. Cir. 1993). Six years later, "the trail was cold." *Id*.

While serving as president, Trump tutored all the world—including future presidents—in how DOJ may be corrupted. Attorney General Jeff Sessions was fired because "Trump blame[d] him for allowing the Russia investigation to begin and thought Sessions should have intervened to end it."[8]

Under Attorney General William Barr, the White House blocked accountability for Trump allies. Peter Baker, *In Commuting Stone's Sentence, Trump Goes Where Nixon Would Not*, N.Y. Times (July 11, 2020).

Before the 2020 election, as President Trump began to push his false narrative of election fraud, Attorney General Barr echoed that false narrative.[9]

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[8] Amber Phillips, *An emboldened Trump says the quiet part out loud about why he fired Jeff Sessions*, Wash. Post (March 4, 2020), at https://www.washingtonpost.com/politics/2020/03/04/anemboldened-trump-says-quiet-part-out-loud-about-why-he-fired-jeff-sessions/; *see* Peter Baker, Katie Benner, & Michael D. Shear, *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. Times (Nov. 7, 2018), at https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html ("President Trump fired Attorney General Jeff Sessions…, replacing him with a loyalist who has echoed the president's complaints about the special counsel investigation… and will now take charge of the inquiry.").

[9] *E.g.*, Wolf Blitzer, *A.G. Barr on Trump Accusing Obama and Biden of Treason... Barr: Mail-in Voting Is "Playing with Fire"*, The Situation Room, CNN (Sept. 2, 2020), https://transcripts.cnn.com/show/sitroom/date/2020-09-02/segment/01.

Bitter experience also shows that a bad leader can spoil DOJ. When the President and the Attorney General align in illegality, some DOJ lawyers resign. Others do the President's unlawful bidding. In 1973 the Attorney General and a deputy resigned rather than fire the special prosecutor. The Solicitor General then carried out Nixon's obstructive command. In 1988 six DOJ lawyers, including the Deputy Attorney General and the head of the Criminal Division, quit due to the Attorney General's legal issues.

President Trump engineered departures of United States Attorneys whom he deemed insufficiently loyal to his own interests. This abuse caused district-court judges to appoint a United States Attorney, lest that post go unfilled. *In re App't of Audrey Strauss as U.S. Attorney*, No. M10-458 (S.D.N.Y. Dec. 22, 2020).

The Senate Judiciary Committee has issued a report, *Subverting Justice*, that established—

> New details of [the] Acting Assistant Attorney General of the Civil Division['s] misconduct, including [efforts] to induce [Acting Attorney General] Rosen into helping Trump's election subversion scheme by telling Rosen he would decline Trump's offer to install him in Rosen's place if Rosen agreed to aid that scheme.
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> New details around Trump forcing the resignation of U.S. Attorney [BJay] Pak because he believed Pak was not doing enough to support his false claims of election fraud….[10]

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[10] U.S. Senate Judiciary Committee, https://www.judiciary.senate.gov/press/dem/releases/following-8-month-investigation-senate-judiciary-committee-releases-report-on-donald-trumps-scheme-to-pressure-dojand-overturn-the-2020-election.

This accumulated history is damning. It shows that when a faithless president decides to injure the United States, some DOJ lawyers abet the abuse. At that point, an administration may resemble Shakespeare's Richard III: "in So far in blood that sin will pluck on sin."[11] Legally unchecked, presidencies may become criminal conspiracies. And the Republic suffers repeated injury at its officers' hands.

Enough is enough. No entity should tolerate such recurring lawlessness among its sworn executives. And the Court, the Nation's constitutional castellan, has a duty to discourage crime within the walls.

It is no answer to say that law-abiding officers will refuse to commit crimes. (Br. of Former Military Officer *Amici*.) Not all officers are law-abiding.[12] And like other departments, the military can succumb to illegal pressure, as the Chairman of the Joint Chiefs did when he helped clear Lafayette Square.

Nor is it adequate to argue, as former officials do, that the Post-Election Usurpation Crimes alleged here constitute a unique assault on Article II. (Br. of Danforth *Amici* at 11–15.) That argument is true as far as it goes. But the history of presidential crime goes well beyond PEUCs—a category that seems narrowly tailored to cabin this case to its facts. And the Court's cases have given authoritarians reason to think that presidential crimes are somehow allowed. Petitioner

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[11] Wm. Shakespeare, *Richard III*, Act 4, scene 2, lines 66–67 (B. Mowat, P. Werstine, M. Poston, and R. Niles, eds.), at https://www.folger.edu/explore/shakespeares-works/richard-iii.

[12] K. Koropin, *3 Active-Duty Marines Convicted for Jan. 6 Roles All Get Probation*, Military.com (Sept. 13, 2023) https://www.military.com/daily-news/2023/09/13/3-active-duty-marines-convicted-jan-6-roles-all-get-probation-community-service.html.

took a very wrong lesson from those cases. One result was the January 6 insurrection.[13]

Candidly, this case gives the Court a chance to repair the harm that prior decisions have caused. And for this task, fact-bound contextualism will not suffice. The specific allegations here point to systemic concerns. The Nation needs to be protected from presidential crime. So let us have no gentle judging. The Court should sound, as if on an uncracked bell, a loud note of power's accountability to principle.

Conclusion

If the People entrust executive power to someone, then that person becomes duty-bound to obey the law. Ours is not a system in which the President can do no wrong. Rather, under the American Constitution, the President must take care that no wrong be done.

The Court should affirm.

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Respectfully submitted,

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[13] M. Brice-Saddler, *While bemoaning Mueller probe, Trump falsely says the Constitution gives him 'the right to do whatever I want,'* Wash. Post (July 23, 2019) at https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/.