

No. 23-624

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DONALD J. TRUMP

*ON PETITION FOR A WRIT OF CERTIORARI
BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

REPLY BRIEF FOR THE PETITIONER

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Respondent agrees that the question whether a former President of the United States enjoys absolute immunity from criminal prosecution for a conspiracy to overturn an election, and thereby prevent the lawful winner from taking office, is an issue of great constitutional moment. Br. in Opp. 1, 19. Respondent's principal argument in opposition is that the Court should wait. That is incorrect. This Court's immediate review of that question is the only way to achieve its timely and definitive resolution.

The district court has set a March 4, 2024 trial date. Respondent's interlocutory appeal has resulted in a stay of any proceedings that would move this case towards trial. And while the court of appeals has expedited briefing and argument on respondent's interlocutory appeal, the time of its final decision is uncertain. Only a grant of certiorari before judgment—a procedure followed in *United States v. Nixon*, 418 U.S. 683

(1974), and comparably consequential cases—will assure that the Court can hear and resolve the case promptly, and in any event in its current Term.

Respondent agrees that the important constitutional question in this case will require this Court's review. But he maintains that the Court should wait for the appellate process to unfold below so that this Court has the benefit of the court of appeals' decision. Br. in Opp. 17-21. That suggestion is misguided. The public interest in a prompt resolution of this case favors an immediate, definitive decision by this Court. The charges here are of the utmost gravity. This case involves—for the first time in our Nation's history—criminal charges against a former President based on his actions while in office. And not just any actions: alleged acts to perpetuate himself in power by frustrating the constitutionally prescribed process for certifying the lawful winner of an election. The Nation has a compelling interest in a decision on respondent's claim of immunity from these charges—and if they are to be tried, a resolution by conviction or acquittal, without undue delay.

Given respondent's categorical immunity claim over every act alleged in the indictment—all of which, he contends, fall within the outer perimeter of his "official" duties, see Br. in Opp. 8, 16—this Court's review is essential to allow this case to move forward. Only this Court can provide the final word on his immunity defense. Certiorari before judgment will allow the Court to set a schedule for briefing and argument to assure that respondent's immunity claim will be resolved as expeditiously as possible.

Respondent's other arguments provide no sound reason to deny immediate review. He asserts that the government lacks standing to bring an appeal. But the

government is not seeking to appeal the district court's order. Respondent himself has appealed that order. The petition asks this Court to grant certiorari before judgment in a case that is already pending in the court of appeals—as the Court has often done at the behest of parties that prevailed in district court. And although a full response to respondent's immunity arguments can await briefing on the merits, respondent errs in asserting that the district court overlooked important aspects of the question. To the contrary, respondent repeats arguments that the district court carefully considered and rejected. Respondent's disagreement provides no reason to defer this Court's resolution of his claim. This Court should grant certiorari and set the case for expedited briefing and argument.

A. This Case Warrants Certiorari

Respondent's immunity claim implicates issues that are central to the rule of law. Contrary to respondent's characterization (Br. in Opp. 8-10), the indictment alleges serious criminal conduct: that respondent, while serving as President and a candidate for reelection, conspired to thwart the lawful transfer of power through (1) fraud against the United States to impair, obstruct, and defeat the federal government's collection, counting, and certification of the results of the election; (2) corruptly obstructing the proceeding conducted by the Joint Session of Congress to confirm the electoral vote; and (3) depriving millions of citizens of their right to have their votes counted. Enforcing federal criminal laws that prohibit such conduct is vital to protecting our constitutional processes and democracy itself.

More than a century ago, this Court, in construing a predecessor to one of the offenses alleged here (18 U.S.C. 241), recognized the necessity of congressional

power to protect elections to federal office against “the influence of violence, of corruption, and of fraud,” finding the claim of a lack of power to prosecute such crimes “so startling as to arrest attention.” *Ex parte Yarbrough*, 110 U.S. 651, 657 (1884). Those laws would lack efficacy if they could not be enforced against violators—including violators at the highest level of government. Respondent’s claim of immunity, if upheld, would thus prevent the evenhanded and impartial enforcement of critical congressional statutes.

At the same time, claims of presidential immunity warrant “special solicitude.” *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982). This Court’s previous grants of certiorari on claims of presidential immunity confirm the importance of the Court’s resolution of the question presented here. See, e.g., *Trump v. Vance*, 140 S. Ct. 2412, 2420 (2020); *Fitzgerald*, 457 U.S. at 747-748; *United States v. Nixon*, 418 U.S. at 703-705. Respondent concedes the surpassingly important nature of the immunity issue. Br. in Opp. 1, 19.

B. Certiorari Before Judgment Is Appropriate

This Court reserves certiorari before judgment for exceptionally important cases where sound reasons justify review in this Court before completion of proceedings in the court of appeals. Sup. Ct. R. 11; Pet. 10. This is such a case. Just as the Court granted certiorari before judgment in *United States v. Nixon*, *supra*, and expedited its proceedings in view of a scheduled criminal trial, it should do the same here. Respondent’s contrary arguments lack merit.

1. Respondent’s assertion (Br. in Opp. 2, 17-21) that immediate review is not warranted runs counter to the principle that in all criminal cases, the public interest in a speedy and fair trial is a paramount value. Here, the

nature of the charges heightens the importance of that value, as the district court recognized. But respondent has sought extraordinary delay. When the district court requested the parties' positions on a trial date, respondent proposed to begin trial in April 2026. D. Ct. Doc. 30, at 1 (Aug. 17, 2023). The court rejected respondent's effort to defer trial for more than two years, as well as the government's January 2024 proposal, and concluded that the trial should begin on March 4, 2024, to fulfill the public's "right to a prompt and efficient resolution of this matter." D. Ct. Doc. 38, at 53 (Aug. 28, 2023).

Although respondent has a right to an interlocutory appeal from the district court's rejection of his immunity defense, *Fitzgerald*, 457 U.S. at 741-743, his appeal has halted progress towards trial. The effect of that appeal, as the district court recognized, is to "automatically stay[] any further proceedings that would move this case towards trial or impose additional burdens of litigation on [respondent]." D. Ct. Doc. 186, at 2 (Dec. 13, 2023). The court therefore stayed the "deadlines and proceedings" specified in its meticulously crafted pretrial order. *Ibid.*; see D. Ct. Doc. 39 (Aug. 28, 2023) (order setting forth deadlines for motions, notices, and other pretrial matters). In short, the case is now on hold.

The D.C. Circuit's grant of the government's motion to expedite respondent's appeal, see Br. in Opp. 17, does not remove the justification for granting certiorari before judgment. The court's expedited schedule reflects the high importance of resolving this appeal rapidly. But only this Court can provide final resolution of the important constitutional issues raised. And the court of appeals' expedited briefing and argument schedule does

not assure an appellate decision that will give this Court adequate time to grant review, receive briefing, hold argument, and resolve this case in advance of the scheduled trial date, or even this Term. Even if the government prevails in a timely issued opinion, the default rules give respondent 45 days to seek rehearing en banc and 90 days to seek certiorari. See D.C. Cir. R. 35(a); Sup. Ct. R. 13.1. Regardless whether respondent uses or is allowed that much time in this case, the available time for briefing and deliberation in this Court would necessarily be reduced by the length of the proceedings in the D.C. Circuit.

Respondent suggests (Br. in Opp. 18-19) that a decision by the court of appeals would be of benefit to this Court. In the ordinary course, allowing the court of appeals time to provide its analysis before this Court grants review would aid the decisional process. But when the justification for immediate review exists, the Court has not hesitated to grant certiorari before judgment, even in cases of great complexity and consequence. For instance, in the controversy over the student-loan forgiveness program, the Court granted certiorari before judgment where no appellate court had issued a decision on the merits. See *Biden v. Nebraska*, 600 U.S. 477, 488-489 (2023). Likewise in the *Steel Seizure Case*, the Court granted review before any appellate decision on the separation-of-powers issue presented there. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952). The same approach is warranted here. Waiting for a court of appeals decision would significantly impair this Court's ability to schedule expedited briefing and argument at a time that is convenient to the Court. Certiorari before judgment allows the Court

to set its schedule now for promptly resolving an issue that it will inevitably be asked to decide.

2. The Court's grant of certiorari before judgment in *United States v. Nixon*, *supra*, supports this approach. There, the criminal trial of the Watergate conspirators (other than President Nixon) lay four months in the future, and the controversy involved whether the President had a constitutionally based privilege to withhold evidence from trial. 418 U.S. at 688. The Court granted certiorari before judgment and expedited briefing, resolving the case 16 days after argument. *Id.* at 690.

Here, the stakes are at least as high, if not higher: the resolution of the question presented is pivotal to whether the former President himself will stand trial—which is scheduled to begin less than three months in the future. And while in *Nixon*, as respondent notes (Br. in Opp. 25), a court of appeals decision had addressed the same privilege issue, the absence of an appellate decision has not counseled against review in other requests for certiorari before judgment that otherwise merited that procedure. See *Biden v. Nebraska*, *supra*; *Youngstown Sheet & Tube Co.*, *supra*. Nor should it here.

This case implicates constitutional bedrock. The Court must resolve this separation-of-powers issue by applying first principles. On foundational questions such as this, it is “the province and duty” of this Court alone to definitively “say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). No less than in *Nixon*, the “imperative public importance” of this case meets the Court's standards for immediate review. Sup. Ct. R. 11; Pet. 10-11; see Pet. 13 (suggesting that, if the Court does not grant review immediately, it

postpone action on the petition to permit it to grant certiorari as soon as the court of appeals acts).

C. Respondent’s Remaining Arguments Lack Merit

Neither respondent’s nor amici’s additional arguments justify denying review.

First, respondent contends (Br. in Opp. 4) that this “Court lacks jurisdiction to grant the petition because the government lacks Article III and prudential standing to appeal from a judgment that is entirely favorable to it.” That contention rests on the mistaken premise that this case represents “an appeal brought by a prevailing party.” *Camreta v. Greene*, 563 U.S. 692, 702 (2011). In fact, this case results from respondent’s appeal of the denial of his motion to dismiss. That appeal presents the Article III case or controversy that the petition asks the Court to resolve. The government’s petition for certiorari before judgment does not constitute an appeal; rather, it seeks review of a case that is already “in” the court of appeals, as authorized by 28 U.S.C. 2101(e).

Precedent supports this conclusion. This Court has frequently granted certiorari before judgment on petitions that were filed by prevailing parties in the district court, including in landmark cases. See *United States v. Nixon*, 418 U.S. at 686-687; *Youngstown Sheet & Tube Co.*, 343 U.S. at 584; *United States v. United Mine Workers of Am.*, 330 U.S. 258, 269 (1947); *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 294-295 (1935). As the Court explained in *United States v. Nixon*, once an appeal is “properly ‘in’ the Court of Appeals,” the party that prevailed in the district court may seek a writ of certiorari under 28 U.S.C. 1254(1) and 2101(e), in which case the appeal is “properly before this Court.”

418 U.S. at 692 (quoting *Gay v. Ruff*, 292 U.S. 25, 30 (1934)).

Here, moreover, respondent’s appeal has resulted in a stay of proceedings in the district court, which indisputably harms the United States. And the United States has the requisite “ongoing interest in the dispute” to ensure “that concrete adverseness which sharpens the presentation of issues.” *Camreta*, 563 U.S. at 701 (citation and internal quotation marks omitted). Respondent’s jurisdictional objection therefore lacks merit.

Second, an amici brief in support of neither party raises an argument respondent has not raised at any point in this case: that the Special Counsel lacks statutory and constitutional authority to bring this prosecution. See Meese *et al.*, Amici Br. 1-24. This Court does not “generally entertain arguments that were not raised below and are not advanced in this Court by any party,” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 721 (2014), and sound reasons support adhering to that practice here. This Court rejected a materially identical statutory contention in *United States v. Nixon*, holding that the Attorney General properly appointed the Special Prosecutor there pursuant to 28 U.S.C. 509, 510, 515, and 533. See 418 U.S. at 694-695. And the D.C. Circuit rejected a materially identical statutory and constitutional challenge to a previous Special Counsel, explaining that *Nixon* constituted a binding statutory holding that the Special Counsel was properly appointed and rejecting amici’s claim that Special Counsels are principal, rather than inferior, officers. See *In re Grand Jury Investigation*, 916 F.3d 1047, 1051-1054 (D.C. Cir. 2019). No reason exists for this Court to allow amici’s unsound arguments, not

presented by a party, to affect the Court's grant of the petition.

Third, respondent previews his immunity arguments on the merits. Br. in Opp. 10-16, 28-34. But the only question here is whether the Court should grant immediate review. His arguments on the merits, and the government's response, will be fully briefed if review is granted. In any event, respondent errs in asserting (*id.* at 28) that the district court's decision "overlooked significant authorities." To the contrary, the district court carefully considered and rejected the arguments and authorities on which respondent relies. See Pet. App. 7a-38a. Respondent's disagreement with the district court's resolution of those issues provides no reason to delay review.

Finally, respondent's claims about the reasons why the government is seeking review are unfounded and incorrect. See Br. in Opp. 21-24. Respondent stands accused of serious crimes because the grand jury followed the facts and applied the law. The government seeks this Court's resolution of the immunity claim so that those charges may be promptly resolved, whatever the result.

* * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari before judgment should be granted.

Respectfully submitted.

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