No. 23-939

In the Supreme Court of the United States

DONALD TRUMP,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Brief of Coolidge Reagan Foundation and Shaun McCutcheon as *Amici Curiae* in Support of Petitioner

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INTERESTS OF *AMICI CURIAE*[1]

Amicus Curiae Coolidge Reagan Foundation is a nonprofit 501(c)(3) corporation established to defend, protect, and advance liberty and fair elections. It focuses in particular on the principles of free speech enshrined in the First Amendment of the U.S. Constitution.

Amicus Curiae Shaun McCutcheon, a successful, self-made American businessman and constitutional patriot, is the Foundation's Founder and Chairman. He was also the prevailing Petitioner in the landmark First Amendment case *McCutcheon v. FEC*, 572 U.S. 185 (2014) (per curiam), in which this Court invalidated aggregate contribution limits. The Foundation and Mr. McCutcheon submit this amicus brief to highlight how the overreaching indictment in this case burdens the fundamental values underlying the First Amendment and infringes upon the President's constitutionally protected prerogative and obligation to engage in political speech.

SUMMARY OF ARGUMENT

1. President Trump should be immune from criminal prosecution for the acts set forth in the indictment because they involved the exercise of

[1] Pursuant to S. CT. R. 37.6, *amici curiae* certify no counsel for a party authored the brief in whole or part, and no party, counsel for a party, or person other than *amici*, the Foundation's members, or *amici*'s counsel made any monetary contributions to fund the preparation or submission of this brief.

executive discretion with regard to the exercise of core executive powers and functions. The Constitution vests the President with the Executive power, U.S. Const., art. II, § 1, cl. 1, as well as the duty and authority to "take Care that the Laws be faithfully executed," *id.* art. II, § 3. The President's efforts to encourage state legislators, Department of Justice ("DOJ") officials, the Vice President, and others to question and investigate the results of the 2020 election were within the scope of his constitutional authority to protect the integrity of federal elections, *cf.* In re *Debs*, 158 U.S. 564, 582 (1895); In re *Neagle*, 135 U.S. 1, 64-68 (1890); enforce federal laws governing the electoral process such as the Voting Rights Act, *see* 52 U.S.C. § 10307(a), and the Help American Vote Act, *id.* §§ 21082-83; and uncover possible violations of constitutional protections for voting rights, *see Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam); *Griffin v. Burns*, 570 F.2d 1065, 1077-78 (1st Cir. 1978). Subjecting former President Trump to criminal prosecution for these activities would constitute impermissible legislative and judicial intrusion into his exclusive constitutional authority. *See Nixon v. Fitzgerald*, 457 U.S. 731, 757-58 (1982).

2. Virtually all the indictment's allegations against former President Trump involve his communications regarding the election to state legislators, Republican candidates for presidential elector, senior DOJ officials, the Vice President, and the public concerning his belief that fraud, irregularities, or other serious problems impacted the results of the 2020 election to persuade them to investigate the matter and ultimately reject

purportedly invalid slates of Democratic electors. Engaging in such pure political speech and attempting to persuade various officials to ensure the validity of the election's results are well within the scope of the President's constitutional authority. More broadly, such political speech is squarely protected by the First Amendment, beyond the scope of criminal punishment, *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam). Whether that speech is, ultimately, factually correct or not deprive it of constitutional protection. *United States v. Alvarez*, 567 U.S. 709, 718 (2012). This Court should construe the scope of presidential immunity even more broadly because the indictment arises from the President's political expression and advocacy efforts concerning federal issues of public concern.

3. Finally, given the unique circumstances of this case, this Court should exercise pendent appellate jurisdiction to assess whether the constitutional avoidance canon allows the statutes set forth in the indictment to be applied to a former President for acts taken while in office. *Cf. Clinton v. Jones*, 520 U.S. 681, 707 n.41 (1997); *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 51 (1995). Especially given the pendency of the 2024 election, for which former President Trump is the Republican party's presumptive nominee, this Court should not allow the prosecution to proceed if the indictment is fatally defective as a matter of law.

On the merits, none of the statutes former President Trump is accused of violating exhibit any express congressional intent to apply to a President or his acts while in office. *See* 18 U.S.C. §§ 2, 241, 371,

1512(c)(2), (k). Applying these provisions to a President's attempts to encourage investigations into alleged irregularities in a federal election and encourage the rejection of ostensibly invalid electoral votes would raise serious questions as to whether Congress were unconstitutionally interfering with the President's Executive power and authority to "faithfully execute" the laws and Constitution. Since the statutes lack any unambiguous language explicitly requiring such an interpretation, this Court should reject it under the constitutional avoidance canon. *Edward J. Bartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Nat'l Labor Rel. Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979). This Court's "reluctance to decide constitutional issues" and concomitant willingness to construe statutes narrowly "is especially great where, as here, they concern the ***relative powers of coordinate branches of government***." *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989) (emphasis added)

ARGUMENT

This unprecedented case involves one of the most dangerous practices in a democratic society: a former President being indicted and criminally prosecuted for the acts he took and political expression in which he engaged while in office, by the Administration of his successor, the leader of the opposing political party. The risks to democracy are exacerbated when that indicted former President has

won his party's nomination in the impending presidential election to challenge the very incumbent ultimately responsible for his federal prosecution.

The supermajority requirement embedded within the Constitution's presidential removal provision, U.S. Const. art. I, § 3, cl. 6, protects a President from being removed for acts taken—and especially for political expression made—while in office, because of Senators' partisan bias or motivations, *see Trump v. Vance*, 140 S. Ct. 2412, 2443 (Alito, J., dissenting) (explaining the Framers "trusted the weighty decision whether to remove a President to a supermajority of Senators, who were expected to exercise reasoned judgment and not the political passions of the day or the sentiments of a particular region").

The criminal justice system offers no such protection. A prosecutor appointed by a partisan Presidential appointee of the opposing political party may prosecute a former President in a hand-picked venue deeply hostile to that former President, his beliefs, political expression, and legacy. "Nothing is so politically effective as the ability to charge that one's opponent . . . [i]s not merely wrongheaded, naive, ineffective, but, in all probability, '[a] crook[].'" *Morrison v. Olson*, 487 U.S. 654, 713 (1988) (Scalia, J., dissent).

The former President's tens of millions of supporters cannot reasonably be expected to accept the typical legal fictions of voir dire under such extreme circumstances. *Cf. Warger v. Shauers*, 574 U.S. 40, 51 (2014) ("Even if jurors lie in voir dire in a way that conceals bias, juror impartiality is

adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered."). Under these unique circumstances, "[c]oncerns of public policy, especially as illuminated by our history and the structure of our government" weigh strongly in favor of immunity. *Nixon v. Fitzgerald*, 457 U.S. 731, 747-48 (1982). This Court should construe presidential immunity doctrine broadly to minimize the likelihood of the criminal justice system being twisted for such blatantly partisan, anti-democratic ends.

I. FORMER PRESIDENT TRUMP IS IMMUNE FROM PROSECUTION

This Court should dismiss the Indictment because all of the counts arise not only from former President Trump's official acts within the scope of his executive power, but also his speech on matters of public concern. The indictment centers around former President Trump's alleged "dishonesty, fraud, and deceit" in his various statements regarding the accuracy and reliability of the 2020 election's results. *Indictment*, D.E. #1, ¶¶ 6-7 (Aug. 1, 2023). The indictment charges four alleged offenses:

- 18 U.S.C. § 371—Conspiracy to defraud the United States by "overturn[ing] the legitimate results of the 2020 presidential election," *id.* ¶ 7, through four methods:

- lobbying state legislators and election officials to investigate their respective states' election results and decline to certify the results in favor of President Biden due to potential fraud or other irregularities, *id.*, ¶¶ 13-52;

- lobbying unsuccessful Republican candidates for the office of presidential elector to submit competing slates of electoral votes for consideration by the joint session of Congress convene pursuant to the Twelfth Amendment, U.S. Const. amend. XII, *id.* ¶¶ 53-69;

- persuading and/or directing the Acting Attorney General and other top-level officers within the U.S. Department of Justice ("DOJ") to send letters to several states stating "there is evidence of significant irregularities that may have impacted the outcome of the election in multiple states," *id.* ¶ 79; *see also id.* ¶¶ 70-85;

- lobbying the Vice President to construe the Twelfth Amendment as empowering him to decide which electoral votes to count or postpone proceedings to allow states to further investigate their elections, *id.* ¶¶ 86, 89-95, 97, 99-102; and made a speech, tweets, and other communications to encourage political protest of the Vice President's treatment of the electoral votes, *id.* ¶¶ 86-88, 96, 103-11.

- 18 U.S.C. § 1512(k)—Conspiracy to obstruct an official proceeding (*i.e.*, Congress' certification of the electoral vote), *id.* ¶ 126;

- 18 U.S.C. § 1512(c)(2), 2—Obstruction of an official proceeding (*i.e.*, Congress' certification of the electoral vote), *id.* ¶ 128; and

- 18 U.S.C. § 241—Conspiracy to "injure, oppress, threaten, and intimidate one or more persons in the free exercise and enjoyment" of their constitutional "right to vote, and to have [their] vote counted," *id.* ¶ 130.

The Biden Administration's Special Counsel is prosecuting former President Trump on the grounds there was no basis for him to question or attempt to challenge the 2020 election's results. Fundamental separation-of-powers considerations, however, preclude the Court from second-guessing a sitting President's determinations concerning the need to investigate possible violations of federal law or interference with federal functions. It especially precludes the federal judiciary from policing the President's speech on matters of public concern—particularly to subordinate members of the Executive Branch—in which First Amendment values buttress the President's prerogatives under Article II.

A. Former President Trump is Immune from Prosecution for His Exercise of Core Executive Powers and Functions

President Trump should be immune from criminal prosecution for the acts set forth in the indictment because they involved the exercise of executive

discretion with regard to the exercise of core executive powers and functions. The Constitution grants the President the "executive Power," U.S. Const. art. II, § 1, cl. 1, and affords him both the authority and the responsibility to "take care that the Laws be faithfully executed." *Id.* These provisions empower the President to not only enforce laws enacted by Congress, but protect federal officials, federal land, and the performance of federal functions in the absence of adequate legislation. *See* In re *Neagle*, 135 U.S. 1, 64-68 (1890); *see also* In re *Debs*, 158 U.S. 564, 582 (1895) (holding the President may seek injunctive relief to eliminate obstructions to interstate commerce even when Congress has failed to create a statutory cause of action); *Logan v. United States*, 144 U.S. 263, 294-95 (1892) (holding the federal government has authority to protect federal prisoners). Pursuant to the President's executive powers, "[t]he entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care." *Debs*, 158 U.S. at 582.

The constitutional provisions discussed above—together with the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and Opinions Clause, *id.* art. II, § 2, —further grant the President the authority to supervise officials in the executive branch who assist in implementing the law. *See Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496-97 (2010) ("The President 'cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,' because Article II 'makes a single

President responsible for the actions of the Executive Branch.'" (quoting *Clinton v. Jones*, 520 U.S. 681, 712-13 (1997) (Breyer, J., concurring in judgment))); *accord Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2203 (2020). This authority, in turn, includes the power to remove the subordinate officers he appointed to perform executive functions. *See Humphrey's Executor v. United States*, 295 U.S. 602, 627-28 (1935) (holding an officer who is "one of the units in the executive department" is "inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and [aide] he is").

The indictment in this case directly second guesses former President Trump's thinking and discretionary choices regarding the exercise of these executive powers during his term in office. Federal laws regulate the electoral process and require state and local officials to accurately tally and canvass votes, particularly in federal elections. These statutes include the Voting Rights Act, *see* 52 U.S.C. § 10307(a) ("No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote . . . or willfully fail or refuse to tabulate, count, and report such person's vote."); and the Help American Vote Act, *id.* § 21082 (allowing provisional ballots to be counted only if the appropriate election official "determines that the individual [who cast it] is eligible under State law to vote"); *id.* § 21083(b)(1) (requiring certain people who registered to vote by mail to provide or submit photo identification before voting).

It "clearly is within the President's constitutional and statutory authority," *Nixon*, 457 U.S. at 756, to ensure compliance with federal laws governing the electoral process as well as constitutional protections for voting rights by ensuring the 2020 election was fundamentally fair, *see Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental . . . ."); *Griffin v. Burns*, 570 F.2d 1065, 1077-78 (1st Cir. 1978) ("If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated . . . . [T]here is precedent for federal relief where broad-gauged unfairness permeates an election, even if derived from apparently neutral action.").

The Indictment challenges the President's state of mind, repeatedly alleging at length he knew such concerns were false because numerous government officials, state officials, campaign personnel, and courts had rejected concerns about the election. *Indictment* ¶¶ 11, 17-18, 23-25, 27, 29, 31, 35-36, 40, 44-45, 48-49, 51, 74, 76-77. Presidents are free, of course, to reject their advisors' assessments; indeed, they often have a solemn duty to do so. *See* Peter W. Rodman, *Presidential Command*, N.Y. Times (Jan. 16, 2009)[2] (discussing "apocryphal" story of a vote in a cabinet meeting on the Emancipation Proclamation in which all of the cabinet secretaries vote nay, after

[2] https://www.nytimes.com/2009/01/18/books/chapters/chapter-presidential-command.html.

which President Abraham Lincoln "raises his right hand and declares: 'The ayes have it!'"). In this case, perhaps states' tallies warranted another look; only six weeks ago a county in Virginia discovered it had miscounted over 4,000 votes in the election. *Northern Virginia County Reports 4,000-Vote Tallying Error in 2020 Presidential Race*, Fox News (Jan. 12, 2024, 8:08 P.M. EST).[3] While the results in that one county would not have changed the outcome (indeed, they happened to favor President Biden), *id.*, this substantial error demonstrates the reasonableness of questioning a process involving over a hundred and thirty million people which is subject to flaws, mistakes, irregularities, and even the possibility of fraud. *See A Sampling of Recent Election Fraud Cases from Across the United States*, Heritage Foundation (last referenced Mar. 18, 2024).[4] In any event, "an inquiry into the President's motives" would "be highly intrusive" and "subject the President to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose." *Nixon*, 457 U.S. at 756. Accordingly, this Court should extend immunity to former President Trump in this case.

In *Nixon v. Fitzgerald*, 457 U.S. at 757-58, this Court addressed the concern that affording the President absolute immunity in the civil context would place him "above the law." It noted, "It is

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[3] https://www.foxnews.com/politics/northern-virginia-county-reports-4000-vote-tallying-error-2020-presidential-race.

[4] https://www.heritage.org/voterfraud/.

simply error to characterize an official as 'above the law' because a particular remedy is not available against him." *Id.* at 758 n.41 This Court added, "A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive," because a range of other remedies exist. *Id.* at 757. The Court identified both "the constitutional remedy of impeachment," as well as "formal and informal checks on Presidential action," including "constant scrutiny by the press," "[v]igilant oversight by Congress," "a desire to earn reelection, the need to maintain prestige," and "a President's historic concern for his historical stature." *Id.*; *Franklin v. Massachusetts*, 505 U.S. 788, 828 (1992) ("Review of the legality of Presidential action can ordinarily be obtained in a suit . . . [against] the officers who attempted to enforce the President's directive.").

It is telling this Court did ***not*** include the possibility of criminal prosecution upon leaving office on this list. *Cf. id.* (emphasizing that, in *Nixon*'s list of alternate remedies against Presidents, "injunctive or declaratory relief against the President is not mentioned"). Such a prosecution with the concomitant risk of imprisonment would exert the greatest chilling effect upon a President. The Court's failure to even mention that possibility is compelling evidence the Court believed criminal prosecution to be unavailable. Moreover, *Nixon*'s analysis applies with full force here. Even without the possibility of criminal prosecution, Presidents still face the full range of constitutional, formal, and informal remedies the *Nixon* Court identified. Finally, even

Nixon's four-Justice dissent recognized the sweep of the majority's holding. Justice White wrote, "The Court intimates that its decision is grounded in the Constitution. If that is the case, Congress cannot provide a remedy against Presidential misconduct and the criminal laws of the United States are wholly inapplicable to the President." *Id*. at 765 (White, J., dissenting). Justice White's explanation of the *Nixon* majority's holding is correct and dispositive here.

B. Former President Trump is Immune from Prosecution for Engaging in Political Speech About Matters of Public Concern While in Office

The critical flaw which pervades the indictment is that it is based entirely on President Trump's attempts to lobby or otherwise convince various officials and other people to take action due to flaws in the election or inaccuracies in the results, and to alert the public to those problems. The Constitution expressly recognizes the President has a duty to convey information and make recommendations to Congress. *See* U.S. Const. art. II, § 3 ("[The 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."). The President plays no less of a role in communicating with executive officials, state legislators, the Vice President, and even the public. *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. Rev. 1031, 1089 n.282 (2013) ("Empirical and descriptive research by

political scientists demonstrates that presidents increasingly have relied on the bully pulpit and have used it to build presidential legitimacy and institutional power.").

The Biden Administration's Special Counsel is prosecuting former President Trump because he contends former President Trump urged various governmental officials and entities to take official action—investigate and reject electoral votes for Biden—on ostensibly false premises. Both fundamental separation-of-powers principles and freedom of speech norms categorically bar federal courts from reviewing and adjudicating presidential speech in this manner, however. Presidents have never been subject to prosecution for seeking or obtaining official action, even if based on a false or mistaken premise, whether it was enactment of the Affordable Care Act, *see* Mark Memmott, *Obama's "You Can Keep It" Promise is "Lie of the Year,"* NPR (Dec. 13, 2013) ("President Obama's oft-repeated promise that 'if you like your health care plan, you can keep it,' is 2013's 'lie of the year,' according to the fact checkers at the *Tampa Bay Times'* nonpartisan PolitiFact project."),[5] or the Inflation Reduction Act, *see* Brandon Gillespie, *Biden Admits Inflation Reduction Act Had "Less to Do With Reducing Inflation" Than He Originally Said*, Fox News (Aug. 10, 2023);[6] *cf.* Daniel Dale, *Fact Check: Biden Makes*

[5] https://www.npr.org/sections/thetwo-way/2013/12/13/250694372/obamas-you-can-keep-it-promise-is-lie-of-the-year

[6] https://www.foxnews.com/politics/biden-admits-inflation-reduction-act-less-inflation-originally-sold-americans.

False and Misleading Claims in Economic Speech, CNN Politics (Jan. 28, 2023).[7] Federal courts should not sit in review of the veracity of statements Presidents make in trying to influence federal or state officials—especially including the Vice President and subordinate members of the Executive Branch—or the public.

Similarly, neither Presidents nor anyone else has ever been subject to criminal prosecution for lobbying for the enactment of even unconstitutional laws, and Presidents in particular have never been prosecuted for proposing or signing them—including under 18 U.S.C. § 241, which prohibits conspiracies to violate constitutional rights.

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[7] https://www.cnn.com/2023/01/28/politics/fact-check-biden-economic-speech-january-2023/index.html

Likewise, no prosecutions have arisen from the letter which Anthony Blinken, currently serving as President Biden's Secretary of State, asked former Acting CIA Director Mike Morell to write, falsely claiming incriminating e-mails on Hunter Biden's laptop appeared to be Russian disinformation. *See* Miranda Devine, *CIA Fast-Tracked Letter That Falsely Suggested Hunter Biden Laptop Was Russia Op*, N.Y. Post (May 9, 2023, 5:38 P.M.), https://nypost.com/2023/05/09/cia-fast-tracked-letter-that-falsely-suggested-hunter-biden-laptop-was-russia-op/. The letter was signed by fifty-one (51) former intelligence officials. Luke Broadwater, *Officials Who Cast Doubt on Hunter Biden's Laptop Face Questions*, N.Y. Times (May 16, 2023) ("Three years later, no concrete evidence has emerged to confirm the assertion that the laptop contained Russian disinformation, and portions of its contents have been verified as authentic."), https://www.nytimes.com/2023/05/16/us/politics/republicans-hunter-biden-laptop.html.

Finally, President Trump's Article II prerogative to lobby state officials, Executive branch officials, the Vice President, and others to promote and achieve his desired policy goals is bolstered by his fundamental First Amendment right to engage in political expression. "Political speech . . . is at the core of the first amendment." *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 483 (1988); *see also Meyer v. Grant*, 486 U.S. 414, 422 (1988) ("[I]nteractive communication concerning political change . . . is appropriately described as 'core political speech.'"). "Discussion of public issues . . . [is] integral to the system of government established by our Constitution," *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam), while "advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

Political expression and advocacy may not form the basis of criminal prosecution simply on the grounds they are false.

> Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. . . . [S]ome false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.

United States v. Alvarez, 567 U.S. 709, 718 (2012); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring) (recognizing "false or misleading political speech" can have "value" and "engender the beneficial public discourse that flows from political controversy").

False claims abound in politics, particularly from Presidents. They are frequently a tool for spurring official action, generating public support for such actions, and even swaying election results. Among recent important whoppers: the border is secure;[8] President Biden neither spoke with Hunter Biden about his foreign business dealings and influence-peddling nor communicated with Hunter's business

[8] *Compare* Thaleigha Rampersad & Andrew Stiles, *WATCH: 17 Times the Biden Administration Said the Border is Secure*, Wash. Free Beacon (Sept. 21, 2022), https://freebeacon.com/biden-administration/watch-17-times-the-biden-administration-said-the-border-is-secure/, *and* Greg Norman & Adam Shaw, *Biden Claims "I've Done All I Can Do" to Secure the Border*, Fox News (Jan. 30, 2024), https://www.foxnews.com/politics/biden-claims-done-all-can-secure-border, *with* Filip Timotija, *Biden Says Border Hasn't Been Secure for the "Last 10 Years,"* The Hill (Jan. 20, 2024, 4:24 P.M.), https://thehill.com/homenews/administration/4419806-biden-says-border-hasnt-been-secure-for-the-last-10-years/.

associates;[9] voter identification laws and other election integrity reforms are Jim Crow 2.0.[10]

Of course, this Court has held the First Amendment does not protect a public employee from adverse employment consequences for engaging in political expression as an official part of their job,

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[9] *See, e.g.*, Ben Schreckinger, *Fresh Revelations Contradict Joe Biden's Sweeping Denials on Hunter*, Politico (Nov. 5, 2023, 7:00 A.M.), https://www.politico.com/news/2023/11/05/hunter-joe-biden-business-testimony-00125056; House Comm. on Oversight & Accountability, *Joe Biden Lied at Least 16 Times About His Family's Business Schemes* (Aug. 24, 2023), https://oversight.house.gov/blog/joe-biden-lied-at-least-15-times-about-his-familys-business-schemes/; *see also* Tom Winter, *Records Released by House Republicans Show Joe Biden Repeatedly Emailed Hunter Biden's Business Associate in 2014*, NBC News (Dec. 21, 2023, 1:07 EST), https://www.nbcnews.com/news/records-released-house-republicans-show-joe-biden-repeatedly-emailed-h-rcna130682.

[10] *Compare* Maegan Vasquez & Kate Sullivan, *Biden Calls Georgia Law "Jim Crow in the 21st Century" and Says Justice Department is "Taking a Look,"* CNN Politics (Mar. 26, 2021, 6:31 P.M.), https://www.cnn.com/2021/03/26/politics/joe-biden-georgia-voting-rights-bill/index.html, *with* Editorial, *Biden's "Jim Crow 2.0" Dies in Georgia*, Wall St. J. (Nov. 9, 2022) ("Voter turnout in the state exceeds the record of 2018, with no report of problems."), https://www.wsj.com/articles/joe-bidens-jim-crow-2-0-dies-in-georgia-voters-midterm-election-raphael-warnock-brian-kemp-stacey-abrams-11668035286; *and* Editorial, *Black Voters Thrilled with "Jim Crow 2.0,"* Las Vegas Review-Journal (Jan. 26, 2023) (discussing a poll from the University of Georgia's School of Public & International Affairs revealing 0% of black respondents rated their voting experience as "poor" while 96.2% rated it "excellent" or "good"), https://www.reviewjournal.com/opinion/editorials/editorial-black-voters-thrilled-with-jim-crow-2-0-2719245/.

even on matters of public concern. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications ***from employer discipline***." (emphasis added)); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (recognizing the need to "arrive at a balance between the interests of the [public employee], ***as a citizen***, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" (emphasis added)). This line of authority does not suggest, however, a public employee is similarly stripped of First Amendment protection against criminal prosecution for on-the-job speech.

Under the circumstances of this case, the fundamental values underlying the First Amendment counsel strongly in favor of construing the scope of former President Trump's Article II immunity even more broadly. The indictment relies almost exclusively on *allegedly* false and fraudulent statements former President Trump made to attempt to influence various federal and state officials and others. This Court must be particularly sensitive to protecting the President's power and prerogative to engage in unfettered political discourse as an essential component of his official constitutional powers. Allowing former Presidents to be criminally prosecuted for what may be false statements to other political actors and/or the public—particularly if he believes them—sets a dangerous precedent, would

chill the President's exercise of his core political functions, and place him at a structural disadvantage in political debates and interbranch disputes to Members of Congress, who may invoke Speech and Debate Clause Immunity for making identical statements. *See* U.S. Const. art. I, § 6, cl. 1.

II. THE CONSTITUTIONAL AVOIDANCE CANON AND SEPARATION-OF-POWERS CONCERNS REQUIRE THIS COURT TO CONSTRUE THE STATUTES UNDER WHICH PRESIDENT TRUMP WAS INDICTED TO EXCLUDE THE PRESIDENT.

In the alternative, this Court should order dismissal of the indictment because none of the statutes under which former President Trump was indicted for his actions and speech while in office should be interpreted as applying to the President or his exercise of executive functions. To the extent these laws do purport to restrict former President Trump's actions and political speech while in office, they are unconstitutional as applied to such circumstances.

A. This Court Has Jurisdiction to Consider the Inapplicability and Invalidity of the Statutes Under Which Former President Trump Has Been Charged.

Although this Court is hearing this interlocutory appeal on the question of presidential immunity, it may properly assess whether the statutes under which former President Trump has been charged

actually apply to a sitting President and his actions—and, if so, whether such application is constitutionally valid—under its pendent appellate jurisdiction. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 707 n.41 (1997) (holding, in an interlocutory appeal concerning a sitting President's claimed immunity against civil litigation, this Court may exercise pendent appellate jurisdiction over the district court's decision to stay the underlying case until the end of the President's term); *cf. Abney v. United States*, 431 U.S. 651, 663 (1977) (holding a criminal defendant who brought an interlocutory appeal of an adverse double jeopardy ruling pursuant to the collateral order doctrine is not automatically permitted to raise other issues from his motion to dismiss).

The separation-of-powers and other constitutional considerations which would give rise to the claimed presidential immunity in this case are "inextricably intertwined" with both the proper interpretation and validity of the statutes with which former President Trump has been charged. *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 51 (1995). Thus, "there are equivalent reasons for vindicating in advance of trial whatever protection" Article II, fundamental First Amendment values, separation-of-powers doctrine, and other constitutional provisions offer a former President immunity against criminal prosecutions for acts taken while he was in office. *United States v. Rose*, 28 F.3d 181, 186 (D.C. Cir. 1994) (quoting *United States v. Myers*, 635 F.2d 932, 935 (2d Cir. 1980)).

Moreover, the constitutional avoidance canon requires this Court to adjudicate this appeal on

statutory grounds, if at all possible. "[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, this Court will decide only the latter." *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (citing *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 191 (1909)); *accord Pearson v. Callahan*, 555 U.S. 223, 241 (2009).

Under the unique circumstances of this case, if Congress either lacks constitutional authority to criminalize the President's exercise of his constitutional powers and prerogatives, or has not done so clearly enough, this Court should conclude the President has a "right not be tried" for such alleged violations. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 800-01 (1989). Compelling reasons exist to immediately dismiss the indictment if it has fatal legal defects. The following scenario is plausible: former President Trump is tried and convicted by a Washington, D.C. jury in a prosecution by a Biden Administration appointee as the national presidential nominating conventions are getting into swing, just a few months before voting in the general election begins; the federal criminal convictions cause former President Trump to lose support among some independent voters, allowing President Biden to be re-elected by narrow margins in swing states; and after the election, former President Trump's convictions are overturned. The federal judiciary will have destroyed the faith of at least half the country in our democratic system and the legitimacy of the election's results. This Court should address any

legally insufficiencies in the indictment now, in advance of both the trial and election, to prevent such a disastrous outcome.

B. The Laws Under Which Former President Trump Is Charged Should Be Held Either Inapplicable to a President's Acts While in Office, or Unconstitutional as Applied

In addition to encouraging this Court to resolve this case as a matter of statutory interpretation rather than on constitutional grounds if possible, the constitutional avoidance canon further counsels this Court to avoid construing or applying the statutes at issue here in ways that raise serious constitutional questions unless the statute's language unambiguously and explicitly requires such an outcome. *See Nat'l Labor Rel. Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (holding Congress must "clearly express[]" its intent before the Court will interpret a federal statute in a way which would "give rise to serious constitutional questions"); *see Edward J. Bartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

One of this canon's "chief justifications is that it allows courts to *avoid* the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Suarez-Martinez*, 543 U.S. 371, 380 (2005) (emphasis in original). Critically, this Court's "reluctance to decide constitutional issues

is especially great where, as here, they concern the ***relative powers of coordinate branches of government***." *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989) (emphasis added) (citing *American Foreign Service Ass'n v. Garfunkel*, 490 U.S. 153, 161 (1989) (per curiam)); *cf. Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (refusing to interpret a federal statute as interfering with states' core sovereign functions absent a "plain statement" clearly requiring such an interpretation).

Article II "guarantees the independence of the Executive Branch." *Trump v. Vance*, 140 S. Ct. 2412, 2425 (2020). As the "head" of that branch, the President possesses both a wide range of constitutional duties "of unrivaled gravity and breadth," as well as "protections that safeguard [his] ability to perform his vital functions." *Id.* This Court has repeatedly held Congress may not burden or restrict the President's exercise of his constitutionally conferred authority. *See, e.g.*, *Zivotofsky v. Kerry*, 576 U.S. 1, 17 (2015) ("The formal act of recognition [of foreign nations] is an executive power that Congress may not qualify."); *Free Enterprise Fund*, 561 U.S. at 483 (reaffirming the Constitution "empower[s] the President to keep [executive] officers accountable—by removing them from office," with certain exceptions (citing *Myers v. United States*, 272 U.S. 52 (1926)); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 141 (1971) ("The President's power is pardon is not subject to legislation . . . . Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders."); *see also Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 954-55 (1983)

(holding Congress may not circumvent the President's authority to veto congressional acts by authorizing legislative vetoes).

None of the statutes set forth in the indictment contains express language suggesting Congress intended to apply them to the President or his executive functions. The Office of Legal Counsel has generally presumed federal criminal laws do not apply to executive branch personnel in the performance of their duties absent clear evidence of congressional intent to the contrary. *See Application of Neutrality Act to Official Governmental Activities*, 8 U.S. Op. Off. Legal Counsel 58, 58, 1984 WL 178355, **1 (Apr. 25, 1984) ("[T]he Act does not proscribe activities conducted by Government officials acting within the course and scope of their duties as officers of the United States . . . ."); *cf. United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 U.S. Op. Off. Legal Counsel 148, 155, 1994 WL 813353, at **5 (July 14, 1994) ("Our conclusion that § 32(b)(2) applies to governmental action should not be understood to mean that other domestic criminal statutes apply to USG personnel acting officially."); *Visa Fraud Investigation*, 8 U.S. Op. Off. Legal Counsel 284, 285, 1984 WL 178371, at *2 (Nov. 20, 1984) (concluding federal criminal "statutes do not apply 'where public officers are impliedly excluded from language embracing all persons because a reading that would include such officers would work an obvious absurdity'" (quoting *Nardone v. United States*, 302 U.S. 379, 384 (1937) (footnote omitted))).

This Court may avoid difficult constitutional questions—whether the President has constitutional immunity from this indictment, whether Congress has constitutional authority to apply the underlying statutes to a President's conduct while in office—by similarly concluding these statutes lack the unambiguous language necessary to apply them to the President's exercise of his executive powers. This Court should not presume Congress sought to bar the President from encouraging the investigation of concerns with the integrity of a federal election, potential violations of federal statutes governing the electoral process, or infringements on the constitutional right to vote. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing." (internal citations omitted)); *Baker v. Carr*, 369 U.S. 186, 208 (1962) (holding the right to vote may be violated in numerous ways, including through "dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box" (citations omitted)).

Allowing either subsequent Administrations or federal courts to second-guess a former President's determinations as to whether potential causes for concern warranted investigation by state officials, DOJ personnel, or even the Vice President would impermissibly limit, burden, and chill a President's ability to apply the Executive power—particularly under the Take Care Clause. Because the statutes under which former President Trump is charged lack express language compelling this Court to reach that

serious constitutional question, it should hold those provisions inapplicable to his conduct while in office. In the alternative, should this Court conclude those laws purport to govern former President Trump's conduct, it should hold them unconstitutional as applied under such circumstances as an impermissible infringement on executive prerogatives. *See, e.g.*, *Zivotofsky*, 576 U.S. at 17; *Free Enterprise Fund*, 561 U.S. at 483; *Klein*, 80 U.S. at 141.

CONCLUSION

The Biden Administration's Special Counsel is prosecuting former President Trump for his pure political speech, saying what he believed (even if others believed it erroneously or without adequate evidentiary foundation), while serving as President: his attempts to lobby or persuade state legislative leaders, Republican candidates for presidential elector, DOJ officials, the Vice President, and ultimately the public, to reject—or at least investigate and reassess—the results of the 2020 election due to concerns about potential fraud or other irregularities.

In contrast, the Biden Administration has refrained from prosecuting prominent Democrats, such as Secretary of State Hillary Clinton,[11] Stacey

[11] *See, e.g.*, Mairead McArdle, *Hillary Clinton Maintains 2016 Election "Was Not on the Level": "We Still Don't Know What Really Happened,"* National Review (Oct. 9, 2020), https://news.yahoo.com/hillary-clinton-maintains-2016-election-160716779.html; Colby Itkowitz, *Hillary Clinton: Trump is an "Illegitimate President,"* Wash. Post (Sept. 26, 2019, 5:03 P.M.),

Abrams,[12] and Representative Katie Porter,[13] who have questioned the legitimacy of elections they lost.

This is the rare situation where the people of the nation, speaking through their electors, have the opportunity to pass judgment directly on former President Trump in the upcoming election. This Court should not open the door to prosecutions of former Presidents by the Administrations of their political opponents—particularly when those prosecutions arise from political speech and matters of executive discretion.

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https://www.washingtonpost.com/politics/hillary-clinton-trump-is-an-illegitimate-president/2019/09/26/29195d5a-e099-11e9-b199-f638bf2c340f_story.html; Dan Merica, *Clinton Opens Door to Questioning Legitimacy of 2016 Election*, CNN Politics (Sept. 18, 2017, 11:07 P.M.), https://www.cnn.com/2017/09/18/politics/hillary-clinton-russia-2016-election/index.html.

[12] *See, e.g.*, David Marchese, *Why Stacey Abrams is Still Saying She Won*, N.Y. Times Magazine (Apr. 28, 2019), https://www.nytimes.com/interactive/2019/04/28/magazine/stacey-abrams-election-georgia.html; Emma Hurt, *Trump Hasn't Conceded Georgia. Neither Did Stacey Abrams. What Changed?* NPR (Nov. 18, 2020, 8:00 A.M.), https://www.npr.org/2020/11/18/935734198/trump-hasnt-conceded-georgia-neither-did-stacey-abrams-what-changed.

[13] Mark Z. Barabak, *Katie Porter Goes MAGA, Claiming California's Election Was Rigged. It Wasn't.*, L.A. Times (Mar. 7, 2024, 1:26 P.M.), https://www.latimes.com/politics/story/2024-03-07/katie-porter-rigged-accusation-california-senate-schiff-garveytk; Caleb Ecarma, *Katie Porter Doubles Down on Claim Her Election Loss was "Rigged,"* Vanity Fair (Mar. 7, 2024), https://www.vanityfair.com/news/katie-porter-doubles-down-claim-election-loss-rigged.

For these reasons, this Court should REVERSE the judgment of the Court of Appeals and ORDER the indictment against former President Trump be DISMISSED.

Respectfully submitted,

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