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

AMICUS BRIEF OF CHRISTIAN FAMILY COALITION (CFC) FLORIDA, INC., A FLORIDA NOT-FOR-PROFIT CORPORATION, IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS

Christian Family Coalition (CFC) Florida, Inc. ("Amicus"), is a nonprofit social welfare organization and is intensely involved in the political process to secure its goals in the public interest. Amicus's success depends upon the responsiveness of the political process and upon the First Amendment protections enjoyed by the nation's political leaders, including the President, to present and espouse the policies for which they were elected.

Amicus submits this amicus brief in support of President Trump and the reversal of the D.C. Circuit's decision on First Amendment grounds. The special position of the President makes it appropriate to reach the First Amendment issues raised by the indictment which criminalizes the pure political speech of the President and is unconstitutional on its face. Amicus supports the immunity grounds asserted by President Trump (p.12 n.2 *infra*) and offers the following additional grounds under the First Amendment for the relief requested.[1]

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[1] No counsel or other representative or agent of any party in this case authored any part of this Amicus Brief or exercised any form of control or approval over this Amicus Brief. No person or entity, aside from Amicus or its counsel, made a monetary contribution to the preparation or submission of this Amicus Brief.

SUMMARY OF ARGUMENT

The indictment purports to criminalize pure speech relating to the 2020 Presidential election and is unconstitutional on its face. Presidential Trump is not charged with violence, insurrection, incitement, or related misconduct. Rather, the indictment seeks to criminalize his electoral advocacy and arguments against the results of the 2020 election by alleging his statements were "knowingly false" as part of an alleged conspiracy to "defraud the United States," "obstruct justice," and deprive his opponents of their "right to vote." Speech concerning election campaigns stands at the pinnacle of speech deserving of First Amendment protection which is exactly what protects the President's statements.

The First Amendment does not tolerate prosecutorial efforts to label political ideologies or advocacy as "false" or "knowingly false" – which is exactly what the indictment charges. Nor does the First Amendment and its required "breathing space" tolerate the risks of a criminal trial on fickle issues of fact as to whether a speaker's political statements were "knowingly false." These are the hallmarks of brutal dictatorships, not what this country is supposed to be.

In the present case, resolution of the First Amendment issue cannot await the ordinary modes of appellate review after a final judgment. The horrendous consequences of a months-long criminal trial of the former President, with over-flowing media coverage, will torture the country and the judicial process which already is maligned as part of a double system of justice. This Court may reach the First

Amendment issue directly. It is dispositive of the entire case and compels dismissal of the indictment – either as part of the immunity issue now on appeal or through this Court's Pendent Appellate Jurisdiction. Both are available and are consistent with this Court's precedent.

ARGUMENT

I. Addressing the First Amendment Issue Directly Is a Practical Necessity and is Legally Permissible, Either as Part of the Immunity Issue on Appeal or Through This Court's Pendent Appellate Jurisdiction

Addressing the First Amendment issue head-on is essential. At its core, this case involves the nation's welfare and its inability to endure what the prosecution intends – month-after-month of a sensationalized and inflammatory criminal trial of former President Trump under an indictment which on its face violates the First Amendment. This, the nation cannot endure, and reaching the First Amendment issue now can prevent it.

This Court is empowered to address this First Amendment issue in either of two ways: either as an essential element of the immunity issue now on appeal (pp. 9-13 *infra*) or through the exercise of this Court's Pendent Appellate Jurisdiction (13-18 *infra*). Either way, addressing the First Amendment issue now is essential for the sake of the nation and for the sake of the judicial process and public respect for it.

The First Amendment violation is clear. The indictment purports to criminalize as an alleged

"conspiracy to defraud the United States" what is nothing more than pure political speech – President Trump's public argument that the 2020 presidential election was stolen and fraudulent, combined with the accusation in the indictment that President Trump's public statements were "knowingly false." This is core political speech.

Addressing the First Amendment issue now is a practical necessity. Ordinary appellate review after a final judgment will not spare the nation from the needless trauma, disruption and anger that a months-long trial of former President Trump and its inflamed media coverage will engender. Nor will ordinary appellate review after a final judgment save the nation from the inevitable trashing and disparagement of First Amendment interests in full public view during month-after-month of hyper-ventilated media coverage of a criminal trial that turns First Amendment protected speech into the crime of a "conspiracy to defraud the United States." Nor will ordinary appellate review after a final judgment save the reputation of the judicial process which already bears the onus of a double-standard of "justice" by reason of the underlying indictment itself.

It is thus appropriate to address the core First Amendment issue now – either as an essential element of the immunity issue now on appeal or through this Court's Pendent Appellate Jurisdiction. This Court's precedent permits both.

II. The Underlying Indictment Clearly Violates the First Amendment on its Face

The underlying indictment broadly accuses President Trump of several felonies on the ground that his speech and communications in challenging the results of the 2020 Presidential election were "knowingly false." The indictment enumerates and details numerous instances of Presidential statements to the public and to election officials. The center piece and pivot point of the indictment are its allegations that President Trump "knew" he lost the election but nevertheless made contrary statements to the public and to election officials that the election was stolen which, according to the indictment, were "knowingly false" (Indictment ¶ 7).

Building on this allegation that the Defendant's statements challenging the election were "knowingly false," the indictment charges President Trump with four felonies – an alleged conspiracy to "defraud the United States" (Count 1), and to obstruct an official proceeding (Counts 2-3), and to deprive voters against him of their right to vote (Count 4).

President Trump's criticisms of the election results lie at the core of what the First Amendment is designed to protect. "No form of speech is entitled to greater constitutional protection" than "[c]ore political speech," *McIntyre v. Ohio Elections Commission,* 514 U.S. 334, 347 (1995), for which the First Amendment's "constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 162 (2014). This type of speech, concerning campaigns for elective office,

commands constitutional "protection of robust discussion [that] is at its zenith." *Meyer v. Grant,* 486 U.S. 414, 425 (1988).

The indictment's violations of these core First Amendment interests are several. First, the indictment takes an inflexible position on a hotly contested political issue (the fairness of the 2020 Presidential election) and criminalizes those who "knowingly" disagree. The issue of whether the 2020 Presidential election was fair-vs.-stolen was, and still is, hotly disputed and the focus enormous sustained political controversy. The First Amendment does not permit either side to dictate the "truth" on this issue but permits each side to present its arguments in the marketplace of ideas. Neither criminal prosecutors nor anyone else may dictate what is "true" vs. "false" in this area. This Court 80 years ago, in what is still good law, admonished that under the First Amendment:

> "[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

Second, the indictment does not permit the required "breathing space" for expression protected by the First Amendment. It is well established that First Amendment freedoms require "breathing space" to survive and may not be hampered or restrained by criminal laws that deter free expression. *Americans*

for Prosperity Foundation v. Bonta, 141 S.Ct. 2373, 2384 (2021) ("First Amendment freedoms need breathing space to survive"); *Keyishian v. Board of Regents,* 385 U.S. 589, 604 (1967) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity").

The indictment runs afoul of this "breathing space" requirement. The indictment criminalizes speech based on fragile and fickle factual disputes over whether President Trump's speech was "knowingly false." The required "breathing space" for First Amendment freedoms may not be so narrow and fragile as to depend upon case-by-case factual disputes over whether speech was "knowingly false." The potential for prosecutorial abuse is limitless.

Third, the criminalization of political speech which a prosecutor deems "knowingly false" unduly chills free speech and forces speakers into impermissible self-censorship. Many potential speakers will choose to be silent rather than risk a criminal trial over whether their speech was "knowingly false." To avoid this self-censorship, broad First Amendment protections are required. Fundamental First Amendment rights concerning core political speech may not depend upon a jury's fickle assessments of a speaker's state of mind. *Ashcroft v. American Civil Liberties Union,* 542 U.S. 656, 670-671 (2004) ("There is a potential for extraordinary harm and a serious chill upon protected speech" because "speakers may self-censor rather than risk the perils of trial").

Fourth, the indictment improperly seeks to create new exceptions to First Amendment protection. Instead of tailoring its focus on well-established and narrow categories of criminal utterances, the indictment makes broad sweeping allegations that President Trump's "knowingly false" speech was part of a wide-ranging conspiracy to "defraud the United States" (Count 1), and to obstruct an official proceeding (Counts 2-3), and to deprive voters against him of their right to vote (Count 4). These are new categories of alleged criminality for the specific speech attributed to President Trump. The First Amendment does not permit the government to criminalize new categories of speech such as "knowingly false" claims of election rigging. *United States v. Alvarez,* 567 U.S. 709, 717-718 (2012) ("[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories of expression long familiar to the bar.'… Among these categories are advocacy intended, and likely, to incite imminent lawless action … obscenity … defamation … speech integral to criminal conduct … so-called 'fighting words' … child pornography … fraud … true threats … and speech presenting some grave and imminent threat the government has the power to prevent…. These categories have a historical foundation in the Court's free speech tradition."); *Brown v. Entertainment Merchants Assoc.,* 564 U.S. 786, 791 (2011) ("new categories of unprotected speech may not be added"); *United States v. Stevens,* 559 U.S. 460, 468, 467 (2010) ("From 1791 to the present … the First Amendment has permitted restrictions upon the content of speech in a ***few limited areas,*** and has never included a freedom to disregard these

traditional limitations. These historic and traditional categories [are] long familiar to the bar … ***including*** obscenity … defamation … fraud … incitement … and speech integral to criminal conduct"; emp.added).

This is not an exhaustive list of the First Amendment violations posed by the underlying indictment. Within the narrow confines of this Amicus Brief – requesting the use of the present immunity appeal or this Court's Pendent Appellate Jurisdiction to reach the core First Amendment issues – there are ample grounds for invoking these jurisdictional prerogatives and for holding the indictment to be a violation of the First Amendment.

III. The Present Immunity Appeal is a Perfect Avenue For Addressing the Core First Amendment Issue as An Essential Element of the Immunity Issue on Appeal

Like other claims of litigation immunity, Presidential Immunity is not merely a defense on the merits but is an immunity to litigation itself which forever would be lost unless enforceable and immediately appealable to prevent the disputed litigation from continuing. *Nixon v. Fitzgerald,* 457 U.S. 731, 742-743 (1982). In *Nixon* this Court held that Presidents have absolute immunity against civil damage claims arising from Presidential acts but also expressed the need for Presidential Immunity in broad terms which apply to criminal charges as well – that the denial of immunity would impair the President's ability to function as Chief Executive because it "would subject the President to trial on virtually every

allegation that an action was unlawful, or was taken for a forbidden purpose." *Id.,* at 756.

True, this Court in *Nixon* stated in *dictum* that Presidents have no general immunity from criminal processes. *Id.,* at 753-754. But that does not mean – nor did this Court hold – that the President has no immunity whatsoever against any and all criminal accusations, regardless of how far-flung they are. The same ability of the President to function – which gives the President absolute immunity against civil damage claims – also requires that Presidential speech within the "outer perimeter" of the Presidential function, including his re-election efforts, not be made "criminal" upon the mere allegation in an indictment that his words were "knowingly false" or "improperly motivated." Otherwise, virtually every word uttered by a President, if disputed by "information" from his adversaries, would subject the President to potential criminal liability for "knowingly false" utterances, whatever that means and whatever criminal charges may flow from them.

Yet this is precisely what the present indictment alleges. While the indictment details numerous communications by President Trump to set aside what he contends was a fraudulent election – countered by the indictment's citations that he was allegedly wrong – the common theme and central point of the indictment are its allegations that the President's statements were "knowingly false" (Indictment ¶ 7) and thereby criminal – as part of an alleged conspiracy to "defraud the United States" (Count 1), and to obstruct an official proceeding (Counts 2-3), and to deprive voters against him of their

right to vote (Count 4). Yet Presidential Immunity and the President's ability to perform ordinary Presidential functions – including communication with the public and seeking re-election to continue his official policies – require a degree of insulation and "breathing space" from criminal liability that cannot be so narrow and fragile as to depend upon case-by-case factual disputes over whether his speech was "knowingly false." *Cf. Americans for Prosperity Foundation v. Bonta, supra,* 141 S.Ct. at 2384 (2021) ("First Amendment freedoms need breathing space to survive"); *Keyishian v. Board of Regents, supra,* 385 U.S. at 604 (1967) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity"). Presidential Immunity, to be effective, requires the same "breathing space," especially where the disputed Presidential actions are themselves speech arguably deserving of First Amendment protection.

Nixon v. Fitzgerald is instructive. The concern for the Presidential function which compelled absolute Presidential Immunity against civil damage claims in *Nixon v. Fitzgerald* applies equally to the Presidential function when challenged with the present type of criminal accusations. The Presidential function includes communicating with the public and seeking re-election – and where necessary challenging the election results – in order to implement and continue his official policies. These important Presidential functions cannot be made to depend upon so fickle and fragile a variable as a factual dispute over whether his speech was "knowingly false." Protection of the Presidential function requires more. The need to

protect the Presidential function under the umbrella of absolute Presidential Immunity from civil damage claims in *Nixon v. Fitzgerald* applies equally to criminal accusations which depend upon fickle factual disputes over whether Presidential speech was "knowingly false." For these types of criminal claims, the protection of the Presidential function makes "it appropriate to recognize absolute Presidential Immunity … for acts within the outer perimeter of his official responsibility." *Nixon,* 457 U.S. at 756.[2]

This is not a partisan or one-sided issue. The danger to the Presidency is obvious and potentially severe. What a left-wing prosecutor today can transform into criminal liability, against a right-wing ex-President for speech that was allegedly "knowingly false," can too easily be turned around after the next Presidential election by a right-wing prosecutor alleging the same against a left-wing ex-President. The political and institutional damage to the Presidency – and to the nation the Presidency is designed to serve – requires the recognition of

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[2] The broader immunity from criminal prosecution asserted by President Trump in his Application for a Stay is also valid. The need for Presidential Immunity from civil liability for acts within the "outer perimeter" of the President's official duties is just as strong in the criminal sphere. Any given action by the President may be relevant to both criminal and civil liability. The facts in *Nixon v. Fitzgerald* highlight the point. The Plaintiff in *Nixon v. Fitzgerald* sued for damages under 18 U.S.C. § 1505 alleging the obstruction of his Congressional testimony. *Nixon* at 740 n.20. But 18 U.S.C. § 1505 also provides criminal penalties for the same conduct. From the standpoint of the Presidential function – and the importance of ensuring his freedom of action – it would make no sense to immunize the President from civil liability but then subject him to criminal prosecution for the same conduct.

absolute Presidential Immunity for the acts alleged in the indictment. For the sake of the Presidency and the nation, criminal liability cannot turn on a mere factual dispute over whether an ex-President's communications in challenging an election were "knowingly false."

IV. This Court's Pendent Appellate Jurisdiction is an Appropriate Vehicle for Addressing the First Amendment Infirmity of the Indictment, Benefiting the Nation and Judicial Economy

Under this Court's Pendent Appellate Jurisdiction, this Court may review nonappealable orders or the underlying legal merits of a case when reviewing the appealable immunity issue now before this Court on interlocutory review. This is permitted when the two issues are "inextricably intertwined … [or when] review of the [nonappealable] decision was necessary to ensure meaningful review of the [appealable decision." *Swint v. Chambers County Commission,* 514 U.S. 35, 51 (1995).

This Court in *Swint* made clear that the "inextricably intertwined" requirement does not require an absolute identity of issues in the appealable and nonappealable orders. It merely requires a substantial linkage between the issues to make the appealable and nonappealable orders "inextricably intertwined" and thus appropriate for the exercise of Pendent Appellate Jurisdiction. This Court in *Swint* cited with approval its own precedent where, in numerous cases, it had approved the exercise of Pendent Appellate Jurisdiction over nonappealable issues which bore a substantial linkage with the

primary issues on appeal without there being a mirror-image identity of the two sets of issues. Thus this Court in *Swint* recounted with approval:

> "*Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 755–757 (1986) (Court of Appeals reviewing District Court's ruling on preliminary injunction request properly reviewed merits as well); *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 172–173 (1974) (Court of Appeals reviewing District Court's order allocating costs of class notification also had jurisdiction to review ruling on methods of notification); *Chicago, R.I. & P.R. Co. v. Stude,* 346 U.S. 574, 578 (1954) (Court of Appeals reviewing order granting motion to dismiss properly reviewed order denying opposing party's motion to remand); *Deckert v. Independence Shares Corp.,* 311 U.S. 282, 287 (1940) (Court of Appeals reviewing order granting preliminary injunction also had jurisdiction to review order denying motions to dismiss). *Cf. Schlagenhauf v. Holder,* 379 U.S. 104, 110–111 (1964) (Court of Appeals exercising mandamus power should have reviewed not only whether District Court had authority to order mental and physical examinations of defendant in personal injury case, but also whether there was good cause for the ordered examinations)."

Swint, 514 U.S. at 50 (reviewing cases where this Court had upheld the exercise of Pendent Appellate Jurisdiction).

The consistent theme in these cases is that the exercise of Pendent Appellate Jurisdiction does not depend upon an absolute mirror-image identity in the issues under review but simply depends upon a substantial overlap and linkage between them which makes the appealable and nonappealable issues "inextricably intertwined." Thus in *Thornburgh,* as recounted in *Swint,* this Court upheld review of the underlying merits of a case in an appeal involving a preliminary injunction. The two issues in *Thornburgh* were not identical but were interrelated and substantially overlapped in their areas of inquiry which made them "inextricably intertwined."

Similarly in *Eisen,* as recounted in *Swint,* this Court upheld the review of the underlying class-action notice in an appeal which involved primarily the allocation of costs in serving the class-action notice. Again, the two issues in *Eisen* were not identical but substantially overlapped in their areas of inquiry which again made them "inextricably intertwined."

The same occurred in *Stude,* also recounted by this Court in *Swint.* In *Stude,* this Court upheld review of a remand order in an appeal involving primarily a dismissal order. Once again, the two issues were not identical but bore a substantial linkage and overlap in their areas of inquiry which made them "inextricably intertwined" and thus appropriate for Pendent Appellate Jurisdiction.

The same occurred in *Deckert*, also recounted by this Court in *Swint*. In *Deckert* this Court approved review of an order denying a motion to dismiss where the primary issue on appeal involved a preliminary injunction. Once again, the two issues were not identical but clearly involved overlapping areas of inquiry which made them "inextricably intertwined" and appropriate for Pendent Appellate Jurisdiction.

Lastly, in *Schlagenhauf,* the final case cited in *Swint* in this sequence, this Court again approved review of a pendent non-identical issue. This Court approved appellate review of the "good cause" for a discovery order where the primary issue on appeal was the underlying authority to issue the discovery order in the first place. As in the other cases recounted above in *Swint,* the two issues on review in *Schlagenhauf* were not identical but bore a substantial relationship and overlapping areas of inquiry which made them "inextricably intertwined."

Other decisions by this Court support this approach. In addition to the many cases examined in *Swint, supra,* this Court has used its Pendent Appellate Jurisdiction to resolve cases finally on the merits in important situations. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952), this Court reviewed the constitutional merits of Presidential action in an appeal which raised an abuse-of-discretion issue concerning a preliminary injunction. The pendent issue in *Youngstown Sheet & Tube* was important – Presidential power to seize steel mills – and required immediate resolution in the national interest. So too in *Smith v. Vulcan Iron Works,* 165 U.S. 518, 525 (1897), this Court reviewed

the underlying merits of an important patent dispute on an appeal which raised primarily issues concerning a preliminary injunction. And in *Thornburgh, supra,* this Court approved the exercise of Pendent Appellate Jurisdiction to reach the constitutional merits of the case where the issue primarily on appeal concerned not the full merits but an alleged abuse of discretion in issuing a preliminary injunction. *Thornburgh, supra,* 476 U.S. at 756, citing with approval *Smith, supra,* 165 U.S. at 525.

This interest in a prompt and final resolution applies here. The First Amendment issues raised by the indictment against President Trump are at least as important – and at least as demanding for prompt resolution – as the pendent issues in the cases discussed above. This Court's approval or use of Pendent Appellate Jurisdiction in these cases warrants its use here. And because the immunity issue now on appeal is "inextricably intertwined" with the pendent First Amendment issue raised by the indictment, the exercise of this Court's Pendent Appellate Jurisdiction is highly appropriate and in the national interest. It will save the nation and judicial process from the partisan torture and upheaval of a first-ever criminal trial of a former President likely to endure for months and aggravated in its severity by the specious nature of the indictment against him.

a. This Court's Decision in *Abney v. U.S.* is Not to the Contrary

This Court's decision in *Abney v. U.S.,* 431 U.S. 651 (1977), is not to the contrary. In *Abney* this Court disallowed Pendent Appellate Jurisdiction over an appeal from the validity of an underlying indictment

when considering an appeal which primarily raised a double-jeopardy bar. This Court in *Abney* made clear that although the jeopardy issue was immediately appealable, the issues involved in the validity of the underlying indictment were separate and distinct from the jeopardy issues. Indeed, the jeopardy argument in *Abney* had nothing to do with the validity of the underlying indictment but rather concerned only an alleged relationship with a prior criminal proceeding. Thus this Court in *Abney* held that Pendent Appellate Jurisdiction was not appropriate to assess the validity of the underlying indictment when considering the appealable jeopardy issues. *Abney,* 431 U.S. at 661 (the double-jeopardy clause "protects interests wholly unrelated to the propriety of any subsequent conviction").

This is not the situation here. Here, unlike *Abney*, the issues are not separate and distinct but are critically inter-related. As discussed above, the immunity issues raised in the present appeal are closely related to and overlap with the First Amendment issues raised by the underlying indictment. The issues relate to a President's ability to address his supporters and the decision-makers who certify and control his re-election – and his First Amendment freedoms in that effort. Simply stated, Pendent Appellate Jurisdiction is appropriate here which is clearly distinguishable from the situation in *Abney*.

CONCLUSION

This Court should reverse the decision of the D.C. Circuit and order the indictment dismissed either by reason of Presidential Immunity and/or its

violation of the First Amendment. While Presidential Immunity requires dismissal of the indictment for the reasons asserted in the Application for a Stay filed by Petitioner, the First Amendment provides a separate basis for its dismissal. This Court may reach the First Amendment issue, and order dismissal of the indictment on First Amendment grounds, either as part of the immunity issue now on appeal or through this Court's Pendent Appellate Jurisdiction.

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