No. 23-939

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

—v.—

UNITED STATES,

Respondent.

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

BRIEF FOR *AMICUS CURIAE* COMMON CAUSE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes, and Rules

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Common Cause is a nonpartisan, grassroots organization dedicated to fair elections, due process, and ensuring that government at all levels is more democratic, open, and responsive to the interests of the people. Founded by John Gardner in 1970 as a "citizens' lobby," Common Cause has over 1.5 million members nationwide and local organizations in 36 states. Common Cause has long supported efforts to protect the integrity of elections from partisan attack or manipulation and to ensure stable governing processes rooted in respect for the rule of law over the rule of individuals. As the partisan political climate—and associated threats of violence—in this country have intensified, Common Cause has redoubled its efforts to defend the processes and institutions that are the *sine qua non* of any democracy: free and fair elections, peaceful transitions of power, and an independent judiciary that resolves controversies impartially and transparently.

Amicus has a strong interest in seeing this Court expeditiously uphold the D.C. Circuit's ruling that former President Trump is not immune from prosecution, so that trial can take place before the November presidential election. Whatever complexities Mr. Trump's immunity argument may present in other fact patterns, his position that he enjoys absolute immunity from prosecution for the criminal acts alleged in *this* pending indictment is

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[1] No party's counsel authored this brief in whole or in part. No party, no party's counsel, nor any person other than Common Cause, its members, and/or its counsel, contributed money for the preparation or submission of this brief.

untenable and poses a direct threat to the rule of law. Moreover, if this Court allows Mr. Trump's groundless claim of immunity to delay trial until after the election, just months after rushing to issue a decision in Mr. Trump's favor before Super Tuesday in a case raising related issues, *see Trump v. Anderson*, 144 S. Ct. 662 (2024), it risks being seen as placing a thumb on the scales in favor of his presidential campaign. The integrity of the political process, and this Court's reputation, demands an equally swift and decisive resolution of this case.

SUMMARY OF ARGUMENT

If this Court rejects former President Trump's immunity defense, but it proves impossible to try Mr. Trump on the pending indictment in this case, that result—profoundly against the public interest—will be largely the consequence of this Court's scheduling decisions. Just as importantly, it will be *viewed* by much of the American public as the consequence of those scheduling decisions. As a result, this Court is at serious risk of being perceived as attempting to influence the 2024 election in favor of Mr. Trump. It should do everything possible now to avoid that impression, which would be highly detrimental to this Court's reputation for neutrality and fairness. Time is of the essence.

This is one of two cases that this Court has faced this Term with potentially outcome-determinative effects on the 2024 election. They are *Trump v. Anderson*, *supra*, the 14th Amendment Insurrection Clause case coming from the Colorado Supreme Court, and this immunity case arising from a federal indictment brought by the U.S. Department of Justice.

Both cases ask, in different ways, whether Mr. Trump illegally attempted to interfere with the outcome of the 2020 election, a question many voters consider highly relevant to how they will cast their ballot this November.

Yet to date, the Court has treated the two cases in dissimilar ways that seem to favor Mr. Trump. In *Trump v. Anderson*, where a state court had questioned Mr. Trump's eligibility for the ballot, the Court acted decisively to reverse that decision and remove the cloud over his eligibility. It held oral argument within five weeks of Mr. Trump's request for certiorari and then took care to issue its decision just four weeks later, the day before the Super Tuesday elections—so as to allow voters to know the outcome of the litigation by primary day. The case lasted a total of nine weeks in this Court from start to finish.

The Court's treatment of *Trump v. Anderson* is of a piece with how it has treated other cases in which the presidency was at stake and the public interest demanded speed. In *United States v. Nixon*, 418 U.S. 683 (1974), this Court heard oral argument over its summer recess and decided the case in just two weeks, ordering the production of the White House tapes and enabling the House of Representatives to vote on President Nixon's impeachment, leading to his resignation two weeks later. In *Bush v. Gore*, 531 U.S. 98 (2000), this Court heard oral argument and decided the case only a day later, allowing Florida to certify that President Bush had won that state, leading to his certification as the next president of the United States.

In this case, however—where a criminal case against Mr. Trump, involving largely the same

underlying facts as in *Trump v. Anderson*, has been stayed pending resolution of his appeals—the Court has appeared to act much more slowly in its decision-making, with the potential effect of forcing Americans to vote on Election Day without knowing whether Mr. Trump is guilty or innocent. In contrast to the five weeks it took in *Trump v. Anderson*, this Court has scheduled oral argument *twenty weeks* after the Special Counsel's initial request for certiorari before judgment, and *nine weeks* after Mr. Trump's current request for intervention. A decision on the merits could come another two months later, rendering a trial before Election Day all but impossible. If that is the outcome and this Court rejects Mr. Trump's immunity defense, then many Americans may fairly wonder whether the disparity in the Court's scheduling decisions in these two related cases—not to mention the even greater disparity in its treatment of the cases involving Presidents Nixon and Bush—were for the purpose of favoring the election of Mr. Trump and denying voters information critical to their decision-making.

To preserve the Court's reputation for neutrality and avoid interfering with the election, the Court should decide this case rapidly so as to permit trial to take place before Election Day. That would vindicate the public interest in a speedy trial. That interest is unusually compelling here because delay until after the election could, if Mr. Trump is reelected, lead to the unseemly spectacle of a criminal defendant directing the dismissal of his own indictment so the public would never learn whether their newly elected president is guilty or innocent. A prompt decision is essential so that voters on Election Day know whether

or not one of the two major candidates has committed serious federal crimes in an attempt to overthrow our constitutional order.

With barely six months between the date of oral argument and the election, this Court is left with little margin for error. But it does have a last, clear chance to prevent Mr. Trump's meritless immunity defense from derailing trial. The Court should seize that opportunity.

ARGUMENT

I. THIS COURT'S SCHEDULING DECISIONS HAVE FACILITATED MR. TRUMP'S STRATEGY OF DELAY.

"We want delays, obviously, I'm running for election," Mr. Trump recently proclaimed at a press conference.[2] Although Mr. Trump was discussing a different proceeding—a felony prosecution against him in New York—his statement plainly describes his overarching strategy to defer trial in all four of the pending criminal cases against him until after the November 2024 presidential election. It is a transparent effort to make a mockery of the rule of law and vindicate his apparent goal to prove that justice delayed is, in fact, justice denied. And no delay is more important to Mr. Trump than delaying trial in this case because, of three criminal cases against him that

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[2] Erik Larson & Patricia Hurtado, *'We Want Delays Obviously': Trump's Busy-Schedule Argument Fails*, BLOOMBERG (Feb. 15, 2024), https://tinyurl.com/LarsonHurtado.

could plausibly go to trial this year, these federal charges are the only ones that go straight to his efforts to prevent the peaceful transfer of power in 2020-21. Mr. Trump's admitted strategy to obstruct the administration of justice is on the brink of succeeding—due in large part to decisions by this Court.

A. Mr. Trump has consistently sought to delay trial until after the 2024 presidential election.

Mr. Trump's campaign to indefinitely delay accountability for his efforts to thwart the outcome of the 2020 presidential election began at his February 2021 impeachment trial before the Senate. In that proceeding, Mr. Trump was charged with inciting insurrection. His counsel contended he should not be convicted by the Senate because he was a former officeholder subject instead to criminal process. "After he is out of office, you go and arrest him," his counsel argued. "[T]here is no opportunity where the President of the United States can run rampant into January, the end of his term, and just go away scot-free." 167 Cong. Rec. S601 (daily ed. Feb. 9, 2021) (statement of Mr. Castor). The Senate Minority Leader, Mitch McConnell, accepted this argument. "President Trump is still liable for everything he did while he was in office," McConnell stated. "[F]ormer presidents are not immune from being accountable." 167 Cong. Rec. S735 (daily ed. Feb. 13, 2021) (statement of Sen. Mitch McConnell). On this basis, Senator McConnell and other senators voted to acquit. Although 57 Senators voted to convict—which if successful would have barred Mr. Trump from running for president again—the Senate failed to secure the

two-thirds supermajority necessary for conviction. *Id.* at S733.

Consistent with the Senate Minority Leader's statement that Mr. Trump should be held accountable for his actions, a House of Representatives Select Committee ("Committee") investigated Mr. Trump's role in the January 6th insurrection. The Committee held a series of public hearings that exhaustively catalogued the troubling facts surrounding that day, many of which now make up the conduct charged by the Special Counsel. In December 2022, the Committee formally referred its findings to the Department of Justice for criminal prosecution and issued its final report—spanning over 800 pages with extensive details of the investigation.

The Special Counsel was appointed in November 2022, after the Committee's hearings but before its report was issued. Mr. Trump was indicted on August 1, 2023. Most of the facts underlying the indictment were included in the Committee's December 2022 report. In fact, Mr. Trump's counsel characterized the indictment as a "regurgitation" of the report.[3] Yet despite acknowledging that the evidence against him had long been publicly known, Mr. Trump immediately began a campaign to delay trial until well after the 2024 presidential election. The centerpiece of Mr. Trump's delay strategy was his immunity defense. He argued that his immunity argument made the case too complex for a speedy trial, explaining that he would be filing "a very complex and sophisticated motion . . . a very, very unique and

[3] Philip Bump, *A Trump attorney offers a first draft of his defense*, WASH. POST (Aug. 2, 2023), https://tinyurl.com/BumpAug22023.

extensive motion that deals with executive immunity." *United States v. Trump*, 1:23-cr-00257-TSC, Dkt. No. 38 at 34 (D.D.C. Aug. 28, 2023).

B. This Court's scheduling decisions have brought Mr. Trump's delay strategy to the brink of success.

Mr. Trump's delay strategy faltered in the lower courts, but subsequent decisions of this Court risk rewarding that strategy. The district court initially rejected Mr. Trump's request for a multi-year delay and ordered trial for March 4, 2024. *United States v. Trump*, 1:23-cr-00257-TSC, Dkt. No. 39 (D.D.C. Aug. 28, 2023). On October 5, 2023, Mr. Trump filed his motion to dismiss the indictment on immunity grounds, coupled with a motion to stay all proceedings pending resolution of the same. *See* Dkt. Nos. 74, 128. The district court denied both motions less than two months later, on December 1, 2023. Dkt. No. 171. Mr. Trump then appealed to the D.C. Circuit, thereby divesting the district court of jurisdiction and leading to a stay of proceedings. Dkt. No. 177.

To minimize the delay resulting from Mr. Trump's immunity defense, the Special Counsel petitioned this Court for certiorari before judgment on December 11, 2023. *See* Pet. at 10 (citing 28 U.S.C. § 2101(e); Sup. Ct. R. 11). In recent years, this Court has frequently granted certiorari before judgment in cases raising high-profile and time-sensitive issues.[4]

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[4] *See* Steve Vladeck (@steve_vladeck), X (Dec. 11, 2023), https://tinyurl.com/VladeckDec11 (presenting data showing that this Court has granted certiorari before judgment nineteen times since February 2019). Subsequently, the Court granted certiorari

Mr. Trump opposed the Special Counsel's petition and this Court denied it on December 22, 2023. Many observers viewed the denial as inconsequential, on the assumption that it meant that the Court viewed the immunity argument as frivolous and intended to deny certiorari after an expected affirmance of the district court order by the D.C. Circuit.[5]

Proceeding on an expedited schedule, the D.C. Circuit affirmed the district court's decision rejecting Mr. Trump's immunity defense on February 6, 2024. *See United States v. Trump*, 91 F.4th 1173, 1183 (D.C. Cir. 2024). As the district court had done, the D.C. Circuit issued its decision within two months of Mr. Trump's first raising it in that court. And, recognizing that time was of the essence, the D.C. Circuit directed that the mandate should issue notwithstanding any attempts by Mr. Trump to seek rehearing or en banc review. Only an appeal to this Court would stay the mandate. Court-watchers assumed that the emphatic and unanimous rejection of Mr. Trump's immunity argument would likely lead this Court to deny certiorari and let the case proceed to a prompt trial.[6] That did not happen.

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before judgment in *Moyle v. United States*, 144 S. Ct. 540 (2024), and *Idaho v. United States*, 144 S. Ct. 541 (2024).

[5] *See* Jessica Levinson, *The Supreme Court's latest Trump decision may be bad news for him*, MSNBC (Dec. 27, 2023), https://tinyurl.com/LevinsonDec27.

[6] *See, e.g.,* Marty Lederman, *The Insignificance of Trump' "Immunity from Prosecution" Argument*, LAWFARE (Feb. 27, 2024), https://tinyurl.com/LedermanFeb27; Norman L. Eisen, *et al.*, *How Long Will Trump's Immunity Appeal Take? Analyzing*

On February 12, Mr. Trump sought a stay of the D.C. Circuit's mandate pending the filing of a petition for writ of certiorari in this Court. *See* Application for Stay, *Trump v. United States*, No. 23A745 (Feb. 12, 2024). On February 14, 2024, in opposing the request, the Special Counsel asked this Court to "treat the application as a petition for a writ of certiorari, grant the petition, and set the case for expedited briefing and argument," if it "believes that [Mr. Trump's] claim merits review at this time." Response to Application for Stay, *Trump v. United States*, No. 23A745 (Feb. 14, 2024), at 3. In such an event, the Special Counsel proposed setting the case for oral argument in March. Mr. Trump opposed the government's request.

This Court took two full weeks to decide what to do. Eventually, on February 28, 2024, the Court issued an order granting certiorari and directing the D.C. Circuit to withhold issuance of its mandate, thus effectively granting Mr. Trump's motion to stay the lower court proceedings. Simultaneously, and without explanation, the Court set oral argument for April 22, nearly *two months* later, rather than the *one month* that the Court allowed for briefing and argument in *Trump v. Anderson,* and more than *four months* after the Special Counsel had first asked the Court to review the immunity issue in December. The Court subsequently postponed oral argument three additional days, until April 25. These decisions, separately and together, made it impossible for this Court to decide this case as expeditiously as the two lower courts had done. And they stood in stark contrast with the Court's actions in *Trump v.*

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the Alternative Timelines, JUST SECURITY (Feb 6, 2024), https://tinyurl.com/EisenFeb6.

Anderson, which (like the proceedings in the lower courts here) took just two months from start to finish. The Court's leisurely schedule stood in even starker contrast with the highly abbreviated schedules on which this Court decided *Nixon* and *Bush*.

Because of this Court's tolerance for Mr. Trump's delay tactics, his strategy is at the brink of succeeding. By the time of oral argument, there will just over six months left before the 2024 election. Without decisive action by this Court, the calendar would then pose a near-insurmountable problem. The district court has indicated that the parties will have 88 additional days to prepare for trial once the case is returned to it, and trial is expected to last up to two months.[7] If this Court takes until the end of the Term before issuing its decision (*i.e.*, the end of June), and allows its mandate to issue in the ordinary course (*i.e.*, the end of July), and the trial court adheres to its statement that Mr. Trump will then have three months more of trial preparation, then the trial would start no earlier than November 1. In that event, a pre-election verdict would be impossible regardless of the outcome of this appeal.

If the Court rejects Mr. Trump's groundless immunity defense expeditiously, however, and refrains from imposing any additional procedural obstacles, a pre-election trial and verdict is still possible. As discussed below, such an outcome is

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[7] *See United States v. Trump*, 1:23-cr-00257-TSC, Dkt. No. 38 at 55 (Aug. 28, 2023); Ryan J. Reilly and Lawrence Hurley, *Supreme Court's immunity hearing leaves prospect of pre-election Trump Jan. 6 trial in doubt*, NBC NEWS (Feb. 28, 2024), https://tinyurl.com/ReillyHurley.

critical to the interests of democracy and the institutional integrity of this Court.

II. THE PUBLIC INTEREST REQUIRES A TRIAL BEFORE THE 2024 ELECTION.

A. Mr. Trump's immunity defense cannot prevent a trial in this case.

Although a full discussion of the merits is beyond the scope of this brief, it should be immediately evident that Mr. Trump's immunity defense *as applied to the actual charges against him* is baseless and cannot prevent this case from going to trial. It is true that presidential immunity from criminal prosecution is a novel issue that may, in the abstract, pose interesting intellectual questions about the limits of executive power.[8] But those abstract issues are irrelevant to the disposition of this case. Here the Court need decide no more than the as-applied issue: whether presidential immunity insulates Mr. Trump from trial on the particular charges against him—charges that must be assumed to be true for purposes of this appeal. As the Chief Justice has warned, "[i]f it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." *Dobbs* v. *Jackson Women's Health Organization*, 597 U.S. 215, 348 (2022) (Roberts, C. J., concurring in judgment).

Mr. Trump's grandiose position that the Constitution affords him absolute immunity from prosecution for *all* official acts is frivolous. Accepting

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[8] *See, e.g.,* Trevor W. Morrison, *Moving Beyond Absolutes on Presidential Immunity*, LAWFARE (Mar. 18, 2024), https://tinyurl.com/MorrisonMarch18.

a bribe in exchange for signing a piece of legislation is permissible? So is ordering federal forces to murder a political opponent? And is it also alright to direct the Justice Department "to conduct sham election crime investigations" for the purpose of fraudulently changing the outcome of an election? *United States v. Trump*, No. 23-cr-00257-TSC, Dkt. No. 1 (D.D.C. Aug. 1, 2023), at ¶ 10(c). These are not difficult questions. As Justice Jackson once said, "presidents are not kings." *Comm. on Judiciary, United States House of Representatives v. McGahn*, 415 F. Supp. 3d 148, 213 (D.D.C. 2019). Indeed, even Mr. Trump concedes, consistent with the plain language of the Impeachment Clause, that a president can be prosecuted for federal crimes if he were first convicted of those offenses at an impeachment trial. That concession dooms his argument here because its corollary that, in his view, such a conviction is a necessary predicate to prosecution is so baseless that this Court declined to grant certiorari to review the question.

Furthermore, even if Mr. Trump's argument had any merit with respect to any particular alleged criminal act, most of the conduct alleged in the indictment does not even arguably involve the president's official duties and is therefore outside the scope of the Question Presented. Mr. Trump allegedly "used knowingly false claims of election fraud to get state legislators and election officials to subvert the legitimate election results" and "organized fraudulent slates of electors in seven targeted states." Indictment, *United States v. Trump*, No. 23-cr-00257-TSC, Dkt. No. 1 (D.D.C. Aug. 1, 2023), at ¶ 10(a) & (b). This alleged conduct is "unrelated to presidential

duties," did "not involve the use of any executive branch powers or resources," and could have been committed by "a first-time candidate who hadn't yet taken office as President."[9] As the D.C. Circuit noted, the central allegation is that Mr. Trump, in his capacity "as office-*seeker*, not office-*holder*," undertook a criminal scheme to interfere with the "certification of the Electoral College Vote," a process in which "the President has no official role." *Trump*, 91 F.4th at 1205 n.14. This is not "official conduct" to which immunity would even arguably apply. That means a trial of Mr. Trump will have to go forward in any event and his immunity defense is not case dispositive.

Mr. Trump does not grapple with this problem in any meaningful fashion, but rather broadly asserts that all his alleged conduct is immune from prosecution. Pet. Br. at 4-5. He contends that if the Court is unconvinced that the indictment should be dismissed in its entirety, it should remand to the lower courts for further proceedings. Pet. Br. at 44-47. This is in keeping with Mr. Trump's strategy of delay, but this Court should not accept it. If the *merits* of Mr. Trump's immunity defense cannot prevent this case from going to trial, then *delay* caused by this Court should not do so.

B. There is a compelling public interest in a speedy trial.

There is a compelling public interest in holding a speedy trial in this case. Speedy trials are of such paramount importance that the Framers codified the obligation to conduct trials with dispatch in the Bill of

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[9] Lederman, *supra note* 5; *see also* Morrison, *supra note* 7.

Rights, *see* U.S. Const. amend. VI, and Congress confirmed that right in federal criminal cases by statute, *see* 18 U.S.C. § 3161 *et seq*. A speedy trial is an outcome-neutral right. The outcome is not known in advance, but win or lose, there is a public interest in airing the evidence and arguments before an unbiased jury, reaching a speedy resolution, and moving on.

Thus, as this Court has recognized, the speedy trial right is "different from any of the other rights enshrined in the Constitution for the protection of the accused" in that it also protects the "societal interest in providing a speedy trial." *Barker v. Wingo*, 407 U.S. 514, 519 (1974). That societal interest "go[es] beyond the rights of the defendant." *Zedner v. U.S.*, 547 U.S. 489, 500-02 (2006) (Alito, J.). Society has an interest in speedy trials to prevent "defendants [who] may be content to remain on pretrial release" from taking advantage of delays to avoid a well-deserved conviction and sentence. *Id*. "[E]xtended pretrial delay" may also "impair[] the deterrent effect of punishment." *Id*. And prolonged delays in criminal cases ultimately impede their prosecution, since "witnesses may become unavailable or their memories may fade" as "the time between commission of the crime and trial lengthens." *Barker*, 407 U.S. at 521; *see also Smith v. Hooey*, 393 U.S. 374, 380 (1969).

The public interest in a speedy trial is especially powerful in the circumstances of this case. Without the deterrent of timely criminal prosecution through to trial and verdict, Mr. Trump, and those inspired by him, may reprise their 2020-21 efforts to undermine an accurate vote-counting process and the peaceful

transition of power, as they have indicated they are prepared to do.[10] And with each day that passes between indictment and trial, Mr. Trump has additional opportunities to threaten or intimidate potential witnesses against him, as he is prone to do, jeopardizing the integrity of an eventual trial.[11]

Moreover, if Mr. Trump is reelected in the November election, he is likely to seek to terminate the criminal charges against him by ordering the Department of Justice to drop the charges, or even by attempting to pardon himself.[12] If this Court has by that time denied his immunity defense, that would present the undemocratic spectacle of an accused criminal defendant, who has been indicted by a federal grand jury and whose many motions to dismiss have been denied by the federal courts, acting in his own self-interest to terminate the prosecution against him. Even if that did not occur, Mr. Trump's prosecution would likely be delayed for the duration of his presidency, as sitting presidents, unlike former ones, may well be immune from prosecution. *See A Sitting President's Amenability to Indictment and Criminal*

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[10] *See, e.g,* Summer Concepcion, *GOP Rep. Elise Stefanik won't commit to certifying the 2024 election results*, NBC NEWS (Jan. 7, 2024), https://tinyurl.com/ConcepcionJan7; Christina A. Cassidy, *Election conspiracy movement grinds on as 2024 approaches*, ASSOCIATED PRESS (March 18, 2023), https://tinyurl.com/CassidyMarch18.

[11] Genevieve Nadeau and Kristy Parker, *The Special Counsel Is Right to Oppose Trump's Delay Strategy*, LAWFARE (Feb. 22, 2024), https://tinyurl.com/NadeauParker (citing *United States v. Trump*, 88 F.4th 990, 1010 (D.C. Cir. 2023)).

[12] *See, e.g.,* Barton Gellman, *How Trump Gets Away With It*, ATLANTIC (Dec. 4, 2023), https://tinyurl.com/GellmanDec4.

Prosecution, 24 Op. O.L.C. 222 (Oct. 16, 2000). In short, there is a very real chance that even a relatively modest delay in the trial will result in an indefinite delay, if not a self-serving termination of the prosecution. That, after all, is the reason Mr. Trump is pursuing a strategy of delay; it may even be part of the reason he is running for president. The public interest in a speedy trial dictates that this Court not permit this strategy to succeed.

C. There is a compelling public interest in holding trial prior to the presidential election.

Beyond the interests of the criminal justice system in holding a speedy trial before Mr. Trump, if elected, is able to thwart it, the American electorate has a vital interest in seeing trial take place before the 2024 presidential election. The indictment alleges that Mr. Trump engaged in a criminal scheme to fraudulently overturn the results of the 2020 election. Unlike most criminal trials, the facts relating to the indictment are already largely publicly known.[13] What is missing is the most critical piece of information—a jury verdict. After a fair trial in which both the Government and Mr. Trump present their cases and cross-examine the witnesses, does an unbiased jury, properly charged on the law by a

[13] For this reason, the Justice Department's informal "60-day rule" is irrelevant to this case. The rule exists to protect candidates for public office from confronting new and inflammatory charges in the run-up to an election, with no opportunity to dispute them in court. Here, as noted above, all that is missing is the resolution in court of the well-known charges against Mr. Trump. In any event, the Justice Department rule is informal and not applicable to any court.

neutral judge, conclude that Mr. Trump is guilty or not guilty of serious federal election crimes? A not-guilty verdict may encourage some voters to vote for him. A guilty verdict may encourage other voters to vote against him. But whatever the outcome, it cannot be gainsaid that a verdict is *the* critical piece of missing information that voters should have in hand as they evaluate their choices in the presidential election. This Court's scheduling decisions should not be the reason that there is no verdict.

In cases with electoral implications, this Court has often recognized the importance of moving with speed to ensure resolution well in advance of Election Day. Expeditious proceedings in election-related cases minimize the risk of "voter confusion" and "give[] citizens . . . confidence in the fairness of the election." *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring); *see also Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 75 (2000) (describing an election-related ruling as occurring with "the expedition requisite for the controversy"), *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 445 (1992) (ordering "expedited briefing and argument" in a case presenting an issue with "significance [to the] year's congressional and Presidential elections").

This principle applies with full force to the present appeal. Taken as true, as they must be for purposes of this appeal, the allegations in the indictment involve some of the most serious conduct imaginable in our democratic system: an effort to "overturn the legitimate results of the 2020 presidential election." Indictment, *United States v. Trump*, No. 23-cr-00257-TSC, Dkt. No. 1 (D.D.C. Aug.

1, 2023), at ¶¶ 4, 7. Thus, the trial in this case will test whether Mr. Trump committed serious criminal acts during his *prior* campaign for the presidency even while he once again asks the American people to re-elect him to the Nation's highest office. Before it decides whether to entrust him with the "singular[ly] importan[t]" duties of the presidency, *Nixon v. Fitzgerald*, 475 U.S. 731, 751 (1982), the electorate deserves to know this highly relevant information regarding his conduct and character. *Cf. Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976) ("Democracy depends on a well-informed electorate.").

Given the significance of this information, it is not surprising that the public *wants* to know the answer before it goes to the polls. Opinion polls consistently show that even in our hyper-polarized political climate, a clear majority of the American people—including a substantial fraction of Mr. Trump's own party—wants Mr. Trump to stand trial in this matter before Election Day.[14] Moreover, a potentially outcome determinative slice of the electorate says the verdict in this case will be material to their vote.[15] To be sure, public opinion polls should

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[14] *See, e.g,* Ankush Khardori, *The Good, Bad, and Ugly in a New Poll on Trump's Trials and the Supreme Court*, POLITICO (March 18, 2024), https://tinyurl.com/KhardoriMarch18 (59% of Americans, including 26% of Republicans, indicating that Trump should stand trial in this case before Election Day); Jennifer Agiesta & Ariel Edwards-Levy, *CNN Poll: Most Americans want verdict on Trump election subversion charges before 2024 vote*, CNN (Feb. 5, 2024), https://tinyurl.com/AgiestaEdwardsLevy (64% of Americans responding that a verdict before Election Day is "essential" or that they would "prefer to see one.").

[15] *See, e.g,* Mark Murray, *How a Trump conviction changes the 2024 race in our latest poll*, NBC NEWS (Feb. 4, 2024),

not in themselves dictate this Court's decisions. But in this case, the public's desire to know the outcome of this prosecution reflects the commonsense conclusion that a jury verdict is in the public interest and of critical relevance to the choice before the electorate this November.

The timing of this Court's actions in *United States v. Nixon,* 418 U.S. 683 (1974), provides a model of appropriate expedition in the public interest on somewhat analogous facts. In *Nixon*, high-ranking presidential aides and former cabinet officials were under federal indictment for illegal acts involving the 1972 presidential election. President Nixon himself was an unindicted co-conspirator. The special prosecutor sought tape recordings made by the President. The President moved to quash the subpoena, and his motion was denied on May 24, 1974. That same day, both the special prosecutor and President Nixon sought, and this Court granted, immediate review in this Court. Although the Court's term had ended, the Court returned to Washington and heard oral argument on July 8, 1974. A decision was reached on July 24, 1974, with the mandate to issue forthwith. In language later echoed by the D.C. Circuit in rejecting Mr. Trump's immunity claim here, this Court unanimously rejected President Nixon's claim to an "absolute, unqualified Presidential

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https://tinyurl.com/MurrayFeb4; Maggie Haberman et al., *Nearly a Quarter of Trump Voters Say He Shouldn't Be Nominated if Convicted*, N.Y. Times (Dec. 20, 2023), https://tinyurl.com/HabermanDec20 ("[M]ost of Mr. Trump's supporters across the battleground states said they would still support Mr. Trump if he were convicted, but about 6 percent said they would switch their votes to Mr. Biden — potentially enough to swing the election.").

privilege of immunity from judicial process under all circumstances." *Id*. at 706.

Why did the Court return to Washington during its summer recess to act with such unusual speed? The Court's opinion referred vaguely to "the pendency of a criminal prosecution," "the public importance of the issues presented," and "the need for their prompt resolution." *Id*. at 687, 716. Left unsaid, but surely on the Court's mind, was that President Nixon was then himself the subject of impeachment proceedings in the House of Representatives. The hearings had been completed, but the House committee had not yet voted when the Court issued its decision. A few days after the opinion issued and with the decision in hand, the House committee voted to impeach President Nixon. President Nixon resigned on August 9, 1974.

In *Nixon*, the ordinary demand for a speedy trial of the public officials under indictment combined with an obvious public interest in knowing the culpability of the president and the imperative need to resolve the *legal* case against him in this Court before the *political* case against him in Congress was resolved. Here, too, there is a compelling need to resolve the criminal charges against Mr. Trump in court before the public is asked to resolve his claim to be re-elected president in the voting booth.

III. TO AVOID THE APPEARANCE OF BIAS, THE COURT SHOULD ENSURE THAT TRIAL CAN OCCUR BEFORE ELECTION DAY.

A. Unless the Court acts decisively, its treatment of this case will appear to favor Mr. Trump.

It is a "basic principle of justice that like cases should be decided alike." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005). With respect to timing, the most obvious comparison is with *Trump v. Anderson*, where the Court was asked just recently to decide whether Section 3 of the Fourteenth Amendment disqualified Mr. Trump from running for office because he had aided and abetted an insurrection on January 6, 2021, in violation of his oath to uphold the Constitution. In *Anderson*, as here, Mr. Trump's actions on January 6th raised issues that the Court was called upon to decide during the course of a heated presidential campaign. There, this Court acted swiftly to provide the nation with clarity in advance of the Super Tuesday primary elections. If the Court rejects Mr. Trump's immunity defense, but does not similarly decide this appeal expeditiously so that trial can take place before the November general election, its failure will be susceptible to the impression that the Court treated the two appeals differently out of favoritism to Mr. Trump.

The Court's expeditious resolution of *Anderson* was commendable, allowing voters to cast primary ballots free of uncertainty. The Court rightly determined that providing the voters with a decision on the matter before they went to the polls was

sufficiently important to warrant a highly expedited appeals process. As Justice Barrett observed, the Court had "settled a politically charged issue in the volatile season of a Presidential election." *Trump v. Anderson*, 144 S. Ct. 662, 671 (2024) (Barrett, J., concurring in part and concurring in the judgment). In that context, she added, the Court should avoid the appearance of partisanship and seek to "turn the national temperature down, not up." *Id.*

In this case, unfortunately, the Court has already created in some minds the appearance of partisanship by failing to act with the same level of urgency it evinced in *Trump v. Anderson* (or in *Nixon* or *Bush*).[16] Under the Court's schedule, it will be impossible to issue a decision in this matter within the same two months that it took in *Trump v. Anderson* and, depending on how long after oral argument the Court takes to decide the case and issue its mandate, the delay could be considerably longer.

As the Court is surely aware, even these superficially modest differences in timing are potentially critical to the ultimate outcome of the underlying prosecution and the November election. As discussed above, with the additional trial preparation time the district court has currently reserved for the parties once jurisdiction is restored, and with trial expected to last four to six weeks, there is just barely enough time to hold trial before the election even if this appeal is decided immediately following the April 25

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[16] *See* Andrew Weissman and Ryan Goodman, *The Supreme Court Is Shaming Itself*, ATLANTIC (Mar. 26, 2024), https://tinyurl.com/WeissmanGoodman.

oral argument.[17] If the Court rejects Mr. Trump's immunity defense, but if its decision is not immediate, or if the Court orders additional proceedings in the district court, holding trial before the election will become virtually impossible.

That outcome would risk serious harm to the Court's legitimacy, which "ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989); *see also Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016) ("Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself."). If this Court's delay in disposing of this appeal has the result of preventing the case from going to trial prior to the election—or going to trial at all—it would give many Americans the sense that the Court, through its arbitrary and unexplained management of its own docket, has played partisan favorites in the midst of a heated presidential election. To paraphrase Justice Barrett, that would turn the national temperature up, not down.

In *Bush v. Gore*, 531 U.S. 98 (2000), this Court decided a dispute over the 2000 election in a way that some people considered to reflect partisanship in favor of George W. Bush. One member of the *Bush* majority, Justice Sandra Day O'Connor, subsequently voiced regret over the decision, noting that it "stirred up the public" and "gave the court a less-than perfect reputation," and that "[m]aybe the court should have

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[17] See Reilly and Hurley, *supra note* 6.

said, 'We're not going to take it, goodbye.'"[18] If this Court concludes that Mr. Trump is not entitled to an immunity defense in this case, but its disposition of this appeal nonetheless has the result of preventing Mr. Trump's trial from taking place prior to the election—or at all—this would likely be seen as similarly partisan. Indeed, given that the impact on the election may result from this Court's unexplained scheduling decisions rather than from its legal analysis, the perception of partisanship could be considerably worse than in *Bush v. Gore*.

But although *Bush v. Gore* is in some respects a cautionary tale, in another sense it provides a useful model for this Court. The Court issued its decision in *Bush* only *three days* after receiving the petition for certiorari, completing briefing, oral argument, and an opinion in that time. *Bush v. Gore*, 531 U.S. 1046 (2000) (granting certiorari on December 9, 2000 and scheduling oral argument for December 11); 531 U.S. 98 (issuing decision on December 12, 2000). As with *Trump v. Anderson* and *Nixon*—and as should be true here as well—the expedited timing of the decision was driven by the public interest. *See Bush v. Gore*, 531 U.S. at 120–21 (Rehnquist, C.J., concurring). If this Court acts with just a fraction of the urgency that was displayed in *Bush*, *Nixon*, and *Trump v. Anderson*, it can still avoid the reputational harm arising from the taint of partisanship.

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[18] Dahleen Glanton, *Retired Justice O'Connor: Bush v. Gore 'stirred up the public'*, CHICAGO TRIBUNE (Apr. 26, 2013), https://tinyurl.com/GlantonApr26.

B. The Court should take measures to ensure that trial can in fact take place before the election.

Because the Court's treatment of this case to date has left so little margin for error, the Court should take several affirmative measures to ensure that a pre-election trial can take place.

First, this Court should decide this case as expeditiously as possible. In *Nixon*, *Bush* and *Trump v. Anderson*, this Court issued its opinions mere days or weeks after oral argument—not months. That expedition is in accord with this Court's speed in other recent, time-sensitive cases presenting issues of critical public importance. *See, e.g., Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109 (2022) (issuing decision less than a week after argument in challenge to nationwide workplace COVID-19 vaccination mandate); *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021) (issuing decision less than six weeks after argument in case involving novel civil enforcement statute); *Trump v. New York*, 141 S. Ct. 530 (2020) (issuing decision less than three weeks after argument in case involving the ongoing census). Indeed, the Court could just dismiss the writ of certiorari as improvidently granted, as it does frequently when upon review of the papers it concludes that there is no genuine need for Supreme Court review.

Second, this Court should issue its judgment even in advance of a full opinion and even if concurring or dissenting opinions are still being written. Again, the Court has done so in cases of critical public importance that present inherent exigency. *See, e.g*,

Republican Party of Pa. v. Boockvar, 141 S. Ct. 1 (2020) (releasing voting-related decision days before the 2020 election with statement that "[a]dditional opinions may follow"); *United Steelworkers of Am. v. United States*, 361 U.S. 39, 44 (1959) (issuing per curiam opinion in case involving nationwide steel industry strike without concurring opinion due to "time limitations imposed by the necessity of a prompt adjudication in this case"); *Rosenberg v. United States*, 346 U.S. 273, 289 (1953) (issuing order allowing execution of Julius and Ethel Rosenberg "in advance of the preparation of full opinions"); *Ray v. Blair*, 343 U.S. 154 (1952) ("announc[ing] [a] decision and enter[ing] [a] judgment" in case involving qualifications for presidential electors weeks before a primary election "in advance of the preparation of a full opinion"); *Ex parte Quirin*, 317 U.S. 1 (1942) (entering order allowing execution of wartime saboteurs "in advance of the preparation of a full opinion").

Third, the Court should issue its mandate forthwith and promptly return jurisdiction to the District Court for the continuation of pre-trial proceedings. Ordinarily, this Court issues its mandate 32 days after the entry of a judgment. Sup. Ct. R. 45(3). But the Court may shorten the time and issue the mandate forthwith, *id.*, and it routinely does so where time is of the essence. The Court did so in *Nixon*, 418 U.S. at 716; in *Bush*, 531 U.S. at 111; and in *Anderson,* 144 S. Ct. at 671.

CONCLUSION

To avoid the appearance that this Court is favoring the election of Mr. Trump by indulging his requests for delay, it should decide this appeal as soon as possible after oral argument and issue its mandate forthwith.

Respectfully submitted,

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