No. 23A745

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

On Application For Stay Pending Disposition Of A Petition For Writ Of Certiorari

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BRIEF OF *AMICUS CURIAE* PROTECT DEMOCRACY PROJECT OPPOSING STAY APPLICATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Other Authorities

INTEREST OF *AMICUS CURIAE*

Amicus curiae the Protect Democracy Project ("Protect Democracy")[1] files this brief in opposition to Applicant-Defendant Donald Trump's ("defendant Trump") application to stay the district court proceedings in this case. Protect Democracy urges the Court not to enable defendant Trump's strategy of pressing an unfounded immunity defense to delay the trial in contravention of the law protecting the public interest in speedy criminal law enforcement.

Protect Democracy is a nonpartisan non-profit organization whose mission is to prevent American democracy from declining into a more authoritarian form of government. Central to that mission is protecting fundamental democratic principles, including: the President of the United States should be chosen by voters in free and fair elections; elections should be followed by peaceful transfers of power; and no one is above the law. Those principles converge in this case in which a former president and current presidential candidate, who stands accused of conspiring to overturn the 2020 election in violation of multiple federal laws, seeks to use the appellate process to delay his trial indefinitely.

[1] In accordance with Supreme Court Rule 37.6, amicus states that: No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than amicus or their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long recognized the public's profound interest in "providing a speedy trial" in criminal cases. *Barker v. Wingo*, 407 U.S. 514, 519 (1972). And when entertaining an application to stay the judgment of a lower court pending certiorari, the public interest is precisely what the Court must consider. As Justice Kavanaugh explained recently, "In deciding whether to grant a stay pending appeal or certiorari, the Court … considers the equities (including the likely harm to both parties) and the public interest." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring); s*ee also Corsetti v. Massachusetts*, 458 U.S. 1306, 1307 (1982) (Brennan, J., in chambers) ("[I]n a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.").

To that end, federal courts have developed a robust body of law designed to minimize delay and limit interlocutory appeals in criminal cases. They have done so to further the significant societal interest in expeditious and orderly trials—specifically the public's interest in having criminal laws enforced quickly, hearing the evidence and learning the outcome of the jury's fact finding, and observing the fair and orderly administration of justice. Unnecessary delay undermines this public interest and the law counsels against it in *every* criminal case.

But this is not just any case. The charges against defendant Trump, and their significance to American democracy, could scarcely be more serious. At the same time, defendant Trump's claim to absolute immunity from prosecution is exceptionally

weak and has been thoroughly rejected by both lower courts. *United States v. Trump*, No. 23-3228, 2024 WL 436971, at *8 (D.C. Cir. Feb. 6, 2024) ("Our analysis is guided by the Constitution, federal statutes, and history, as well as concerns of public policy. Relying on these sources, we reject all three potential bases for immunity both as a categorical defense to federal criminal prosecutions of former Presidents and as applied to this case in particular.") (internal citation omitted); *see also United States v. Trump*, No. 23-CR-257, 2023 WL 8359833, at *14 (D.D.C. Dec. 1, 2023).

While defendant Trump no doubt hopes that this Court will grant him the absolute immunity from legal accountability he has long sought, his primary strategy is to delay the trial until after the 2024 election for the purpose of denying the voters relevant information and perhaps avoiding a jury of his peers altogether.[2] The questions before the Court thus implicate the public interest in the timely administration of justice in a way that no other case has in the nation's history, and the Court should not intervene to enable defendant Trump's strategy of thwarting that interest.[3] While it was appropriate for the court of appeals to allow defendant

[2] For example, before essentially laying out this strategy in his stay application, defendant Trump initially proposed a trial date of April 2026. As the United States explained, "defendant's actions make clear that his ultimate objective . . . is to delay the trial at all costs and for as long as possible." Government's Opposition to Defendant's Motion to Stay Case Pending Resolution of Motion to Dismiss Based on Presidential Immunity at 3–4, *United States v. Trump*, No. 23-CR-257 (D.D.C. Nov. 6, 2023), ECF No. 142.

[3] Defendant Trump has already succeeded in delaying his trial by months. Pre-trial proceedings have been stayed since December 13, 2023, and out of necessity, the district court recently removed the original trial date (March 4, 2024) from the calendar and indicated that it will give defendant Trump additional time to prepare in direct proportion to the length of the divestiture of the court's jurisdiction. Minute

Trump's interlocutory appeal and consider his immunity claim, *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58, (1982), there is no basis for continuing to freeze progress toward trial while defendant Trump makes one last effort to salvage a defense this Court is unlikely to uphold.

Indeed, there is little reason for the Court to take up this case at all. But if it does grant defendant Trump's petition for certiorari, it should deny his application for a stay of the district court proceedings in the meantime. In the alternative, as it did at defendant Trump's urging in *Anderson v. Trump*, No 23-719—which also concerns a matter of public importance related to the upcoming election—the Court should set an expedited schedule for considering defendant Trump's petition, and if it grants the petition, an expedited schedule for briefing and argument. The Court should then act quickly to affirm that former presidents are not immune from prosecution when their actions, official or otherwise, violate generally applicable federal criminal law.

ARGUMENT

I. The Court should deny defendant Trump's application for a stay.

Trial court proceedings in this criminal case of great significance to our democracy have been delayed for months because defendant Trump asserted a novel immunity defense that, if valid, would protect him from standing trial on the charges

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Order, *United States v. Trump*, No. 23-CR-257 (D.D.C. Feb. 2, 2024); Order, *United States v. Trump*, No. 23-CR-257 (D.D.C. Jan. 18, 2024), ECF No. 195 (noting that the court does not assume defendant Trump is preparing for trial during the pendency of the stay and that the originally scheduled trial date contemplated seven months of preparation time).

against him and all litigation burdens associated with doing so. But now that the court of appeals has affirmed the district court in resoundingly rejecting that immunity defense, the automatic divestiture of jurisdiction required by *Griggs,* 459 U.S. at 58, has terminated and the stay can be maintained only if this Court allows it. If the Court does not, the court of appeals is free to issue the mandate returning jurisdiction to the district court for the resumption of pre-trial proceedings. *Magnum Imp. Co. v. Coty*, 262 U.S. 159, 163–64 (1923) ("It involves no disrespect to this court for the Circuit Court of Appeals to refuse to . . . suspend the operation of its judgment or decree pending application for certiorari to us."). In this circumstance, the law requires that defendant Trump make an "extraordinary showing" to continue to delay his criminal trial by way of a stay, *id*. at 164, and he cannot do so.

"The standards for granting a stay pending disposition of a petition for certiorari are well settled." *Deaver v. United States*, 483 U.S. 1301, 1302 (1987). The applicant must establish a reasonable probability that the Court would grant certiorari and reverse; that he will suffer irreparable harm absent a stay; and, in close cases, that "the injury asserted by the applicant outweighs the harm to other parties or to the public." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). Application of this test strongly favors denial of a stay where the strong public interest in speedy resolution of criminal cases, and the accompanying disfavor for interlocutory criminal appeals, far outweigh any harm defendant Trump would suffer from being subjected to litigation burdens as he pursues review of a claim he

is likely to lose. *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 746 (2023) ("litigation-related burdens," such as preparing for trial, do not constitute irreparable harm).

A. The Court is not likely to reverse the lower courts' denial of defendant Trump's novel and unsupported claim to immunity from prosecution.

Defendant Trump's legal claim to absolute immunity in this case is extraordinarily weak and the Court is not likely to reverse the appellate court's decision saying so even if it grants certiorari.

The asserted immunity defense is invented out of whole cloth and amounts to a claim that the president of a democratic republic somehow operates outside the bounds of the law. Until defendant Trump did so in this case, no such immunity had ever been advanced by any president, much less recognized by a court. Now that he has raised it, both lower courts, in thorough and well-reasoned opinions, have unanimously rejected defendant Trump's theory of absolute immunity from criminal prosecution as lacking any basis in our Constitution or laws. As the court of appeals described it, defendant Trump's claim would "collapse our system of separated powers," "plac[e] the President beyond the reach of all three Branches" of government, and render "former occupants of the office above the law for all time thereafter." *Trump*, 2024 WL 436971, at *40. To be sure, this is not the language in which close questions of law are described.

The unanimous rejection of defendant Trump's claim by the lower courts is also consistent with history and the manner in which this Court and others have treated claims that the president is above the law. As the court of appeals recognized, no

president before defendant Trump (or even Trump himself until now) has imagined that former presidents were immune from criminal prosecution. *Id.* at *33–34. President Nixon accepted a pardon from President Ford and President Clinton agreed with a special prosecutor to accept a fine and the suspension of his law license. By doing so, both acknowledged that former presidents are subject to prosecution. *Id.* Defendant Trump's own attorneys conceded as much when defending him against impeachment and challenging the validity of a state subpoena. *Id.* The Senate Majority Leader and multiple United States Senators from defendant Trump's political party also affirmed this long standing assumption when they explained that their votes to acquit him on impeachment charges were based on the understanding that his unlawful conduct could be prosecuted. Amy B. Wang & Felicia Sonmez, *Seven GOP Senators Vote to Convict Trump; McConnell Says Former President Trump Is Responsible for Capitol Riot But Votes to Acquit*, WASH. POST (Feb. 13, 2021), http://tinyurl.com/pabaa9tj.

Likewise, state and federal courts—including this Court—have consistently rejected defendant Trump's repeated claims that he is immune from legal process and civil liability for conduct undertaken while he was president. *See Zervos v. Trump*, 74 N.Y.S.3d 442 (N.Y. Sup. Ct. 2018) (Trump subject to suit in state court for conduct undertaken before he was president); *Trump v. Vance*, 140 S.Ct. 2412 (2020) (Trump subject to state court subpoena); *Trump v. Mazars*, 140 S.Ct. 2019 (2020) (Trump subject to Congressional subpoena); *Blassingame v. Trump*, 87 F.4th 1 (D.C. Cir., 2023) (Trump subject to civil damages claim for conduct undertaken outside the scope

of his office). The Court is not likely to depart from the overwhelming weight of these precedents to now place defendant Trump above the law.

If defendant Trump's immunity claim is worthy of the Court's review at all, it is only for the purpose of affirming the lower courts' decisions and stating finally that the president is not above the law. Doing so does not require extended deliberation and no further delay of the district court proceedings is required in the meantime.

B. The public interest and additional equities in this case favor allowing the district court proceedings to resume.

Considering the public's interest in speedy criminal trials and the fact that interlocutory appeals are detrimental to that interest *in all cases*, defendant Trump's request to maintain the stay of all district court proceedings pending certiorari *in this case* should be rejected.

1. The law recognizes a strong public interest in the speedy resolution of criminal cases and disfavors interlocutory appeals.

This Court has long recognized that "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Barker*, 407 U.S. at 519; *see also Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979) ("The public . . . has a definite and concrete interest in seeing that justice is swiftly and fairly administered."). This public interest in a speedy trial is manifold: "[A] public trial protects the right of the accused to have the public know what happened in court; to let the citizenry weigh his guilt or innocence for itself, whatever the jury verdict; [and] to assure that the procedures employed are fair." *Rovinsky v. McKaskle*, 722 F.2d 197, 201–02 (5th Cir. 1984).

Because delay defeats the truth-seeking component of criminal cases, it "is not an uncommon defense tactic" that contravenes the public interest. *Barker*, 407 U.S. at 521. As this Court has explained, with the passage of time, "witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof." *Id*. In addition, delay presents opportunities for bad actors to commit other crimes, diminishes the deterrent value of criminal prosecutions, and otherwise thwarts the interests of justice. *Dickey v. Florida*, 398 U.S. 30, 42 (1970) (Brennan, J., concurring). Delayed resolution of *any* criminal case is thus disfavored and the Constitution, statutory laws, and court rules are all structured to avoid it. *See, e.g., Di Bella v. United States*, 369 U.S. 121, 126 (1962) ("The Sixth Amendment guarantees a speedy trial. Rule 2 of the Federal Rules of Criminal Procedure counsels construction of the Rules 'to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay'; Rules 39(d) and 50 assign preference to criminal cases on both trial and appellate dockets.").

Interlocutory appeals are an especially formidable tool in the hands of defendants seeking delay. Accordingly, such appeals are rare in criminal cases and the Court permits them only under strictly limited circumstances precisely because "the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." *Id.*; *see also Abney v. United States*, 431 U.S. 651, 662 n.8 (1977) ("Admittedly, our holding may encourage some defendants to engage in dilatory appeals as the Solicitor General

fears."); *United States v. MacDonald*, 435 U.S. 850, 861–62, (1978) ("Fulfillment of this guarantee [of a speedy trial] would be impossible if every pretrial order were appealable.") As the D.C. Circuit summarized, "The collateral order doctrine is intentionally narrow and selective in its membership, and is especially so in criminal cases where encouragement of delay is fatal to the vindication of the criminal law." *Khadr v. United States*, 529 F.3d 1112, 1117 (D.C. Cir. 2008) (internal citations and quotation marks omitted). In few cases is that so true as it is here.

2. The offenses charged in this case are serious and delay threatens the integrity of the proceedings.

The public interest in the speedy resolution of criminal cases is underscored by the seriousness of the charges in this case. Indeed, few offenses could be more serious than an alleged conspiracy to overturn the lawful result of a presidential election and prevent a peaceful transfer of power. As the district court explained, "In this case, [defendant Trump] is charged with attempting to usurp the reins of government." *Trump*, 2023 WL 8359833, at *12 ; *see also Trump*, 2024 WL 436971, at *4 ("[F]ormer President Trump understood that he had lost the election and that the election results were legitimate but that he nevertheless was determined to remain in power.") (internal citation omitted). The rule of law depends on political leaders respecting the will of the voters, which the conduct charged in this case attempted to subvert. The public's right to an expeditious resolution of the case is paramount on that ground alone—but there are others.

Defendant Trump's quest for delay also presents an opportunity for him to continue to threaten the integrity of the criminal proceedings by intimidating the

individuals involved. As the district court found when it entered a gag order in this case, defendant Trump "has continued to make … statements attacking individuals involved in the judicial process, including potential witnesses, prosecutors, and court staff…Defendant [Trump] has made those statements to national audiences using language communicating not merely that he believes the process to be illegitimate, but also that particular individuals involved in it are liars, or "thugs," or deserve death." *United States v. Trump*, No. 23-CR-257, 2023 WL 6818589, at *2 (D.D.C. Oct. 17, 2023). Further, the district court found that when defendant Trump makes such statements publicly attacking individuals involved in his criminal trial, "those individuals are consequently threatened and harassed." *Id*.

The court of appeals found the same. It concluded that defendant Trump's public attacks on the district judge, the Special Counsel's staff, and potential witnesses—which continued even after the district court entered its order—posed "a significant and imminent risk to the fair and orderly administration of justice." *United States v. Trump*, 88 F.4th 990, 1010 (D.C. Cir. 2023). For these reasons, the court of appeals affirmed the portion of the order preventing defendant Trump from making statements about known or foreseeable witnesses concerning their participation in the case, or statements about counsel (other than the Special Counsel), court and counsel staff, and family members of counsel and staff, with the intent to interfere with their work on the case. *Id*. at 1027–8. This is precisely the sort of mischief Justice Brennan identified as reason to avoid delay in criminal trials:

"[W]hile awaiting trial, an accused who is at large may . . . commit other criminal acts." *Dickey*, 398 U.S. at 42.

3. The Court should not lend its support to defendant Trump's attempt to delay trial for the purpose of preventing the public from receiving critical information in advance of a presidential election.

In an attempt to undermine the truth-seeking function of criminal trials, *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998), defendant Trump hopes to delay his trial for the express purpose of preventing the public from learning the evidence that will be presented and the jury's verdict until after the 2024 election. That may be in defendant Trump's political interest, but it is contrary to the law protecting the public interest. The Court should not be in the business of enabling a defendant's efforts to avoid the truth-seeking function of a timely criminal trial.

The information that will emerge from defendant Trump's trial on charges of conspiring to overturn the 2020 election—whether that information suggests guilt or innocence—is indisputably important to the public interest, and that is especially so in the midst of another presidential election. Not only may the evidence, outcome, and conduct of the trial be relevant to voters' choice of presidential candidates, it may also shed light on the culpability (or lack thereof) of other public figures or organizations seeking voters' support. As this Court recognized, "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976). Of course, that interest in the ability to make informed choices, along with the general public interest in speedy resolution of criminal trials, must be balanced against the former president's rights as a criminal defendant. But defendant Trump's rights do

not include the ability to run for office unencumbered by the continued administration of justice. And the damage to the public interest that would result from further delay far outweighs any legitimate interest defendant Trump might have here.

In setting the initial March 4th trial date, the district court weighed the appropriate factors, including the public's interest in a speedy trial and the defendant's interest in having adequate time to receive discovery and prepare for trial. Pretrial Order, *United States v. Trump*, No. 23-CR-257 (D.D.C. Aug. 28, 2023), ECF No. 39. Importantly, that decision is not at issue here. This case should not be rushed to trial in service of any particular electoral outcome any more than it should be kept from trial for the same reason—and the courts should not put a thumb on the scale in favor of any particular outcome. Yet the latter is what defendant Trump is asking of this Court by seeking to further stay the district court proceedings so that he can avoid going to trial before the election. The Court should decline to give candidate Trump that assistance.

II. If the Court grants a stay, it should expeditiously resolve defendant Trump's claim to immunity.

If the Court does decide to grant defendant Trump's application for a stay, Protect Democracy urges the Court to set an expedited schedule. This approach comports with Court's practice in cases of similar significance.

This Court, along with the lower federal courts, has acted with dispatch before when issues of national political importance have come before it. In *United States v. Nixon*, 418 U.S. 683 (1974), President Nixon challenged a court order to turn over his

infamous White House recordings based on an assertion of executive privilege. The courts took three months to fully resolve the matter from its initiation in district court all the way through this Court's final ruling. *See United States v. Mitchell*, 377 F. Supp. 1326 (D.D.C.), *aff'd sub nom. United States v. Nixon*, 418 U.S. 683 (1974). In the federal litigation surrounding Florida's recount during the 2000 presidential election, the district court and Eleventh Circuit Court of Appeals resolved the Bush campaign's request to stop the recount in six days, *Siegel v. Lepore*, 234 F.3d 1162 (11th Cir. 2000) (Mem. Op.), while this Court ultimately resolved parallel litigation less than one month after it was initiated in Florida state courts, *Bush v. Gore*, 531 U.S. 98 (2000); *see also* Stanford Law School Robert Crown Law Library, *Timeline of Florida Recount, Florida litigation, and Bush v. Gore*, http://tinyurl.com/6j7rnune.

More recently, this Court moved quickly—*at defendant Trump's request*—to hear a case involving his potential disqualification from holding office under Section 3 of the Fourteenth Amendment. The American public has as much interest in the speedy resolution of this criminal prosecution involving defendant Trump's alleged interference in the last election as defendant Trump has in remaining on the ballot for the next one.

CONCLUSION

For the foregoing reasons, the Court should deny defendant Trump's application.

Respectfully submitted,

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