No. 23-939

In the Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICI CURIAE* STATES OF OHIO, ALASKA, AND WYOMING IN SUPPORT OF PETITIONER

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H. Comm. on the Judiciary, *Impeachment of Richard M. Nixon, President of the United States*, H.R. Rep. No. 93-1305 (Aug. 20, 1974) 20

John Henry Wigmore, *Evidence in Trials at Common Law* §1367 (J. Chadbourn ed. 1974) 25

Joseph Story, *Commentaries on the Constitution of the United States* §156 (1833) 8

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Meilan Solly, *When President Ulysses S. Grant Was Arrested for Speeding in a Horse-Drawn Carriage, Smithsonian Magazine* (March 31, 2023) 19

Only Policeman Who Ever Arrested a President, *The Sunday Star* (Sept. 27, 1908) 19

STATEMENT OF *AMICI* INTEREST

The amici States value their role "as laboratories for devising solutions to difficult legal problems." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015); *see also New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). They too, must grapple with knotty questions of the separation of powers, including executive immunity. The amici States' experiences with executive immunity give them a keen interest in how this Court approaches this case.

The amici States also have a deep interest in the law of executive immunity, as anything this Court decides on the subject will influence equivalent state doctrines.

Finally, the amici States have an interest in a robust and agile office of the chief executive within the bounds of the rule of law.

INTRODUCTION

Presidential immunity is very broad and necessary. But it is not absolute. The limits of that immunity might aptly be described as Judge Easterbrook long-ago described the circumstances and consequences for setting aside corporate immunity—they are like "lightning:" "rare" and "severe." Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 89 (1985). Setting aside either should not be "unprincipled." *See id.*; *see also id.* at 109–13. Ohio, Alaska, and Wyoming submit this amicus brief to propose a principled standard for that rare instance: the charged acts' nexus to Article II power and the urgency of the situation surrounding those acts. Whether this case is that rare

instance can only be determined in light of facts yet to be found in the court below.

That two-part standard is how the amici States would urge the Court to answer the question about the "extent" of presidential immunity. Order in No. 23-939 (Feb. 28, 2024). Even very broad immunity cannot be absolute for official acts. An absolutely immune executive is a monarch or a dictator. Immunity must have limits in order to preserve the peoples' sovereignty to assure that "no official, high or petty," *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), can place himself beyond their reach.

But presidential immunity must also be very broad to achieve the purposes of Article II, and the coordinate branch of the judiciary should be chary of intruding upon it. Any analysis must account for the many reasons justifying that protection, including as a guard against a different threat to the peoples' sovereignty—a political rival, high *and* petty, who might use criminal process to deprive the people of their choice for President.

To be sure, announcing a test for presidential immunity in this case's posture might seem unusual. But this case is the first of its kind. And it is boiling with political overtones over the flame of the 2024 general election already well underway. Many citizens perceive this case as politically motivated. After this case, the idea of pressing criminal charges against a current or former President will always be on the table. Announcing a test now, before all the facts are aired, not only aids the trial process, but may well "turn the national temperature down." *Trump v. Anderson*, No. 23-719, 2024 WL 899207, at *7 (U.S. Mar.

4, 2024) (Barrett, J., concurring in part and concurring in the judgment).

The amici States therefore encourage the Court to define the "extent" of presidential immunity along the lines outlined below so that further proceedings in this first-of-its-kind case can be litigated within the Constitutional guardrails this Court announces. Presidential immunity generally, and the immunity claim in this case especially, should turn on the alleged acts' nexus to Article II power and the urgency of the alleged acts.

STATEMENT OF THE FACTS AND CASE

The amici States will not add to the Court's reading load by plowing well-tilled earth covering the background to this dispute.

SUMMARY OF ARGUMENT

I. The President wields vast power and responsibility. That is, of course, part of the Constitution's design, as it assures a vigorous executive. One enemy of that planned vigor is the specter of liability. Immunity for official acts is therefore necessary for the President to be effective. And the President's vast powers necessitate a capacious immunity. Such broad immunity is reflected in the country's history, as this is the first case of its kind. Despite this history and the mandate of the separation of powers, presidential immunity cannot be absolute. Absolute immunity would betray the ultimate sovereignty of the people. The push of the need for a vigorous executive and pull of the peoples' sovereignty require a test for immunity that recognizes both of those values.

II. This Court's order asks about presidential immunity's "extent." The amici States suggest that

immunity should be defined by standards, not rules, because presidential immunity must be sensitive to the almost limitless circumstances in which presidential immunity might arise.

A. In many contexts, this Court uses standards instead of rules to accommodate the boundless range of contexts in which the standard will apply. One example is the doctrine for evaluating Fouth Amendment searches. This Court has reversed lower courts for adopting "bright-line tests" or "checklist[s]" to resolve such cases. *Florida v. Harris*, 568 U.S. 237, 244 (2013). If the Fourth Amendment's explicit text does not command bright lines, presidential immunity derived from the Constitution's structure does not command them either.

B. As in other areas of the law, a bright-line immunity test would risk both too much permission and too much deterrence. A well-known example of rules granting too much permission is the federal tax code. It may be unrivaled for detail, but it is infamous for over-incenting tax avoidance. That same risk could attend a too-rigid rule of immunity by, for example, immunizing conduct that would be urgent in wartime by not peacetime. An example from the other direction is copyright law's fair-use defense, which this Court has shaped to avoid deterring the very creativity that the copyright law is designed to foster. *See, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). A similar risk would flow from too-rigid rules about presidential immunity. A bright line that induces timidity would cost the country too much in lost executive vigor.

III. All of this leads to a presidential-immunity test that accounts both for the nexus of the charged

act to core Article II power and the urgency of the circumstances surrounding the charge act. Applying that test might well look like the approach to qualified immunity.

A. Deciding whether a charged act exceeds the boundaries of presidential immunity should start with asking how closely the act lies to core Article II power. The closer an act is to that core, the stronger the case for immunity. Conducting foreign affairs is closer to the core than seeking confidential information of the President's political rivals. This nexus inquiry should also be sensitive to other constitutional values. For example, a criminal complaint that targets the same conduct that led to impeachment and acquittal might be a nonjusticiable political question. And a complaint targeting presidential speech might hit core Article II power so directly as to end the immunity inquiry without further analysis.

B. Deciding whether a charged act exceeds the shield of presidential immunity also must account for the act's urgency. A decision in peacetime lacks the urgency of a decision during wartime. Any decision that an act lies outside immunity's protection should factor in the urgency of the President's actions.

C. This two-factor standard can operate much like qualified immunity. Like qualified immunity, presidential immunity may be resolved before trial, during pretrial fact-finding, or even after trial. And, as with qualified immunity, a court errs by resolving immunity in either direction before factfinding resolves a question that proves dispositive.

ARGUMENT

Very broad, but not limitless, presidential immunity is dictated by our constitutional structure. Any standard for deciding where presidential immunity ends and presidential accountability begins must start with the known unknowns: the nature of the executive acts and the circumstances in which they arise are almost infinitely varied. Standards, not bright-line rules, are best suited to such situations. The amici States propose that those standards should look to: 1. how close the charged act relates to core Article II power and 2. how urgent the charged act was in the circumstance.

I. The Constitution's structure and history demand broad, but not limitless presidential immunity.

The President "occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). Unlike the other branches, the "President is the only person who alone composes a branch of government." *Trump v. Mazars USA, LLP*, 591 U.S. 848, 868 (2020). Despite the one-person composition of the executive branch, its occupant "has vast responsibilities both abroad and at home." *Trump v. Vance*, 140 S. Ct. 2412, 2437 (2020) (Thomas, J., dissenting). Those duties "range from faithfully executing the laws to commanding the Armed Forces." *Id.* at 2425 (majority opinion). And those enumerated duties are not the whole of the President's responsibilities. The President's duties "are of unrivaled gravity and breadth." *Id.*

These vast and varied powers set the President apart from all other officials in the country. For one thing, in the President alone does the entire nation repose its hopes and dreams for the future. As Justice Robert Jackson put it decades ago, the presidency concentrates executive authority "in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 653 (1952) (R. Jackson, J., concurring). Said another way, "[c]onstitutionally speaking, the President never sleeps." *Vance*, 140 S. Ct. at 2441 (Alito, J., dissenting) (citation omitted).

Reposing so much power and responsibility in one person, of course, is a well-known part of the Constitution's plan "to ensure both vigor and accountability" in the Executive Branch. *Printz v. United States*, 521 U.S. 898, 922 (1997). "Energy in the Executive," Hamilton remarked before ratification, "is a leading character in the definition of good government." The Federalist No. 70, Avalon Project, https://avalon.law.yale.edu/18th_century/fed70.asp. An energetic executive, Hamilton continued, guarded against foreign and internal threats, and assured the "steady administration of the laws." *Id.*

The greatest enemy of vigorous and energetic action in office is the specter of liability. An official with one eye on later-imposed civil or criminal penalties does not have both eyes on the public duties entrusted to that office. The timidity that accompanies liability is why the Constitution and the common law shield official acts with an array of immunities. For example, the Constitution's Speech and Debate Clause

counteracts legislative timidity, including from "intimidation by the [rival] executive and accountability before a possibly hostile judiciary." *United States v. Johnson*, 383 U.S. 169, 181 (1966); *see* Const. art. I, §6. And common law immunities similarly ensure that a host of officials "who serve the government do so with the decisiveness and the judgment required by the public good." *Filarsky v. Delia*, 566 U.S. 377, 390 (2012). Indeed, the Court has identified avoiding "unwarranted timidity" as "the most important special government immunity-producing concern." *Richardson v. McKnight*, 521 U.S. 399, 409 (1997).

If official vigor, and the immunity that helps ensure it, is "of vital importance" for run-of-the-mill officials, *Filarsky*, 566 U.S. at 390, immunity for the President is in a league of its own. No matter how important some other official may be to a locality, a state, or a region, only the office of the President shoulders duties "that are essential to the country's safety and wellbeing." *Vance*, 140 S. Ct. at 2440 (Alito, J., dissenting). And presidential immunity has been linked to a well-functioning executive throughout the nation's history. Early on, Justice Story commented that the President must have "the power to perform" his duties "without any obstruction or impediment whatsoever," including fear of "arrest, imprisonment, or detention." Joseph Story, 3 *Commentaries on the Constitution of the United States* §156 (1833). More recently, the Court held that the President is absolutely immune from damage suits for official acts and that the office enjoys a privilege from discovery. *Fitzgerald*, 457 U.S. at 749; *United States v. Nixon*, 418 U.S. 683, 708 (1974).

Immunity for the President rests not just on these functional concerns, but also flows from the

Constitution's structure. "Presidential immunity derives from and is mandated by the constitutional doctrine of separation of powers." *Fitzgerald*, 457 U.S. at 758 (Burger, C.J., concurring); *see also Clinton v. Jones*, 520 U.S. 681, 691 (1997); *United States v. Nixon*, 418 U.S. at 708. The basic insight is that the President has vast duties, and "those duties come with protections that safeguard the President's ability to perform his vital functions." *Vance*, 140 S. Ct. at 2425.

The deeper, *structural* insight is that the separation of powers guards against prosecutions that target the President for political gain. After all, "targeting" a candidate "may be an alluring and effective electoral strategy." *Vance*, 140 S. Ct. at 2447 (Alito, J., dissenting). Ask President Andrew Johnson. He escaped conviction after being impeached for refusing to abide a statute that this Court later said violated the Constitution. *See* 1 Trial of Andrew Johnson, President of the United States, Before the Senate of the United States on Impeachment by the House of Representatives for High Crimes and Misdemeanors 6 (1868); *Myers v. United States,* 272 U.S. 52, 106–107, 176 (1926). The problem has only grown worse since then. The "criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part). "In other words, the opportunity for public officials to weaponize the criminal justice system against their political adversaries has never been greater." *Gonzalez v. Trevino*, 60 F.4th 906, 908 (5th Cir. 2023) (Ho, J., dissenting from denial of rehearing en banc).

These functional and structural foundations translate to an immunity so sturdy that in the nation's

twenty-three decades even some of its most shameful moments have not triggered criminal liability for the President. *See, e.g.*, *Haaland v. Brackeen*, 599 U.S. 255, 312 (2023) (Gorsuch, J., concurring) (noting presidential role in the Trail of Tears); *Trump v. Hawaii*, 585 U.S. 667, 710 (2018) (describing presidential role in Japanese internment during World War II).

This immunity, like many others, is sturdy in another way, too. The immunity cannot evaporate once a President leaves office. That would "eviscerate" the immunity. *Trump v. Thompson*, 142 S. Ct. 680, 680 (2022) (Kavanaugh, J., respecting denial of application); *cf. Nixon v. Admr of Gen. Servs*., 433 U.S. 425, 449 (1977) (discovery privilege survives President's tenure); *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998) (attorney-client privilege survives client's death).

If these considerations protect a President during or after holding office from *civil* liability, how much more do the same principles apply to *criminal* liability? It is one thing to lose money and time in a civil suit; it is vastly more serious where "the stakes are higher" because "liberty or even life may be at stake." *Mitchell v. United States*, 526 U.S. 314, 328 (1999) (internal quotation marks omitted).

Yet executive immunity cannot be absolute. Perhaps nothing more starkly defined this Nation's break from the Old World and the prevailing norms of the Eighteenth Century than the idea of the peoples' sovereignty. The new nation was "a government of the people." *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995). As Lord Acton would later quip, "There is no worse heresy than that the office

sanctifies the holder of it." Letter from John Emerich Edward Dalberg, Lord Acton, to Bishop Mandell Creighton (Apr. 5, 1887). And in a government of the people, no person—even the President—can be fully above the law. All the officers of the government, from the highest to the lowest, are "creatures of the law and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220 (1882). Not even the President is "above the law." *United States v. Nixon*, 418 U.S. at 715; *see also Vance*, 140 S. Ct. at 2432 (Kavanaugh, J., concurring).

The push of immunity and pull of the peoples' sovereignty means that, while it is "important" to recognize that "no man is above the law, … there is no question that the nature of the [presidency] demands in some instances that the application of laws be adjusted" in some way. *Vance*, 140 S. Ct. at 2446 (Alito, J., dissenting). More specifically, determining whether immunity or accountability must prevail will turn on the specific actions charged as unlawful and the urgency of the circumstances that triggered the President's action. A court tasked with deciding a question of presidential immunity must proceed "with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." *Holland v. Florida*, 560 U.S. 631, 650 (2010). In other words, the "lower courts in cases of this sort involving a President will almost invariably have to begin by delving into" the details of charged crimes and the reasons for the President's actions. *Vance*, 140 S. Ct. at 2433 (Kavanaugh, J., concurring). That is so because, while immunity may cover almost everything the President does, it does not quite shield absolutely everything.

II. The test defining the limits of presidential immunity should be a fact-intense set of standards, not a bright-line set of rules.

This Court framed the question presented in terms of any immunity's "extent." The test for deciding when that immunity ends must account for the many different circumstances that might pose an immunity question. The test should be standard-focused, not rule-focused. That conclusion follows from the nature of presidential immunity and the well-known risks that bright-line rules pose through either over-permissiveness or overdeterrence.

A. The many contexts in which presidential immunity may arise call for standards, not rules.

The simultaneous push of the separation of powers and the pull of the peoples' sovereignty means that the President enjoys immunity from criminal liability for official acts in many, but not all circumstances. That is the easy part. The hard part is how to give some shape to an immunity doctrine pushed and pulled in opposite directions by powerful constitutional values.

The question of presidential immunity, like so many open questions in law, triggers the classic debate between rules and standards. The law, of course, should always aim for rules, which promote predictability and stability. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179–80 (1989). And at least two rules emerge from what has been said so far. One, as dictated by the separation of powers, broad presidential immunity is necessary to preserve a vigorous executive branch. Two, as required by the ultimate sovereignty of the people, that immunity must have some limits such that the

people may hold the President criminally liable in the rare circumstances that unquestionably call for it.

Beyond those hard rules, though, the limitless variability in which a question of presidential immunity might arise calls for standards, not rules. *See id.* at 1186–87. That would hardly set presidential immunity cases on an island. In some areas, courts must "eschew[] mechanical rules." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (Frankfurter, J.). For example, this court resolves disputes about Fourth Amendment searches using a "flexible, common-sense standard" because the demands of that amendment are "not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates,* 462 U.S. 213, 232, 239 (1983). Those cases do not turn on "bright-line tests" or "checklist[s]" *Florida v. Harris*, 568 U.S. 237, 244 (2013). Indeed, a lower court commits error by trying to impose neat rules in this area. *See id.* at 244, 250. A similar standards-based approach characterizes the Court's Sixth Amendment right-to-counsel cases. In those cases, no "set of detailed rules … can satisfactorily take account of the variety of circumstances" that such claims present. *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984). And as with the Fourth Amendment, lower courts err when they try to craft "strict rules" to evaluate these claims. *Cullen v. Pinholster*, 563 U.S. 170, 195–96 (2011). Many other legal questions require standards rather than rules. *See, e.g.*, *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 37 (2012) (takings-clause claim for an easement); *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (procedural due-process); *United States v. Young*, 470 U.S. 1, 16 (1985) (plain error).

If the explicit commands of the Fourth Amendment and the Sixth Amendment cannot always be

reduced to sharp-edged rules, all the more so for presidential immunity, which represents a "broader presupposition of our constitutional structure." *Allen v. Cooper*, 589 U.S. 248, 254 (2020) (citation omitted); *see also Alden v. Maine*, 527 U.S. 706, 730, 736 (1999). When a court is faced with deciding whether particular presidential acts (or words) are immune from criminal prosecution, it should not make that judgment without a fully developed factual record. And courts err in this area if they try to use categorical rules either to grant or deny immunity. *See, e.g.*, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006) (lower courts committed errors in opposite directions by applying a categorical rule to grant or deny relief respectively). And they should be sensitive in this area to the possibility that a seemingly clear-cut case may involve "countervailing factors," *Puckett v. United States*, 556 U.S. 129, 143 (2009), that only appear from the full record.

B. As in other areas of law, bright-line rules for presidential immunity risk either too much permission or too much deterrence.

The reason that some legal questions—like the Fourth and Sixth Amendment examples above—must be answered by standards instead of rules is that rules sometimes confer too much permission or impose too much restraint. The basic problem is easily illustrated. If a rule criminalized doctors performing any medical procedure without informed consent, it would stop the good Samaritan doctor from aiding the unconscious car-crash victim she happened upon right after the accident. From the other direction, imagine an immunity from the informed-consent crime for any procedure a doctor performed while the patient was

unconscious. That immunity—applied without context—would let a doctor avoid consequences despite sexually assaulting unconscious patients.

The law, of course, is more nuanced than this simplified hypothetical, yet it is not immune to the problems that too-rigid rules create when standards would better fit the task. Start with the problems created when too-rigid rules confer too much permission. The multi-volume tax code is a classic example. "The tax law is the paradigmatic system of rules." A. Weisbach, *Formalism in the Tax Law*, 66 U. Chi. L. Rev. 860, 860 (1999). But "taxpayers have been able to manipulate the rules endlessly to produce results clearly not intended by the drafters." *Id.* That result not only fails the goals of taxation, but "demoralizes" those who put their faith in a system of rules. *Id.*

This Court's cases provide other illustrations. For example, this Court reversed the Federal Circuit's "rigid approach" to the defense of patent obviousness. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 415 (2007). That rigidity, of course, encouraged patent seekers to claim immunity from competition and "withdraw[]" valuable knowledge "into the field of its monopoly and diminish[] the resources available to skillful men." *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.,* 340 U.S. 147, 152–153 (1950).

The lessons of these doctrines translate to presidential immunity. Like the very rigid and detailed rules of the Internal Revenue Code, a rule that marks the outer limit of immunity would confer too much permission to future Presidents. For example, a rule of immunity regarding property seizures would make sense in wartime, but license too much power in peacetime. The hypotheticals could be endless, but

that is the point. The President's wingspan is so great that etching the rules for all circumstances in advance betrays the flexibility needed for the unforeseen.

In the other direction, rigid rules imposed in places where flexible standards should prevail risks "'over-deterrence,' *i.e.*, the possibility that severe … penalties will chill wholly legitimate" activity. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 636–37 (1981) (citation omitted); *see also* R. Bork, The Antitrust Paradox 78 (1978). The Court's approach to copyright's fair-use defense, for example, avoids outcomes in which deciding cases through "rigid application" of the law might "stifle the very creativity which that law is designed to foster." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). And that defense, because it applies in many contexts, is framed as a set of "general principles, the application of which requires judicial balancing, depending upon relevant circumstances." *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183, 1197 (2021). The doctrine is necessarily "flexible," and "its application may well vary depending upon context." *Id.* at 1197. For example, the more utilitarian the protected work, the more forgiving the law is to fair use. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 527 (2023).

A similar concern drives this Court's approach to the right to counsel. The Court has treated the Sixth Amendment as imposing a minimal baseline of competent assistance of counsel for defendants. At the same time, the Court cautions that a hard-and-fast "set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. … Indeed, the existence of detailed guidelines

for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

These overdeterrence risks bear on the judicial task of setting standards for presidential immunity When overdeterrence cows public officials "in the discharge of their duties," the resulting timidity "can entail substantial social costs." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Such "*in terrorem* restraint" on public officials is harmful when it restrains individual police officers, *see Malley v. Briggs*, 475 U.S. 335, 354 (1986) (Powell, J., concurring in part and dissenting in part), and that effect is all the more damaging when it restrains the President.

Both risks—over-permissiveness and overdeterrence—take on added saliency when used to set the boundaries of presidential immunity. Any rule-like pronouncement could result in too much permission or too much restraint for a President when that rule-like legal principle must be applied to the huge variety of presidential action.

III. The standards for setting the extent of presidential immunity should account for the charged act's nexus to Article II power and the urgency of the act charged as crime.

All told, the wide variety of the President's duties translates to a wide variety of circumstances that might call for immunity from prosecution. The foreign-affairs powers, if exercised to kill enemies of the state, would almost certainly require immunity as to a murder charge. The appointment power, if used to make an allegedly corrupt appointment, would raise a less-obvious question of immunity from bribery

charges. And the pardon power, if used to release convictions of political donors, could raise questions of immunity from conspiracy charges. The near-limitless contexts for possible immunity lead the amici States to propose that the test for those rare times when a court should conclude that a President in not immune be guided by two principles. One, that courts account for how closely the alleged crime related to core Article II power. The closer to core power, the stronger the case for immunity. Two, that the courts account for the urgency of presidential action. The more urgent the actions, the stronger the case for immunity.

A. The test for the scope of presidential immunity must account for the nexus between the charged act and core Article II power.

The nexus component has two sub-components. The first resembles a simple measurement. It asks how close the charged actions lie to core Article II powers. The second is more conceptual. It asks whether other constitutional values shed light on how close the charged act lies to core Article II power. The second factor honors the maxim to *measure twice and cut once.*

Proximity to core Article II power. One factor to drive the immunity decision is how central the charged acts are to the core of Article II power. For starters, any conduct can be assessed against congressional action to decide whether any charged conduct represents "maximum" power, power at its "lowest ebb," or power in "a zone of twilight" between those two. *Youngstown Sheet & Tube Co.*, 343 U.S. at 635–37 (R. Jackson, J., concurring). And within those categories, surely the Court can recognize the difference

between "core executive power" such as investigating and prosecuting crime, *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2200 (2020), and the outer limits of official conduct. We may never know, for example, whether President Grant was engaged in any official business when he was arrested for speeding his horse in the area of 13th and M Streets NW, but his actions that day lay further from core Article II power than appointing ambassadors or investigating crime. *See* Meilan Solly, *When President Ulysses S. Grant Was Arrested for Speeding in a Horse-Drawn Carriage, Smithsonian Magazine* (March 31, 2023) (available at https://perma.cc/36WQ-K3SN); *see also Only Policeman Who Ever Arrested a President, The Sunday Star,* Part 4 at 2 (Sept. 27, 1908). More recently, President Clinton raised eyebrows when he gifted overnight White House stays to major campaign donors. Liz Essley Whyte, *The Lincoln Bedroom is Still Paying Dividends*, Slate (Oct. 26, 2015, 12:08 PM). Those acts, too, are far afield from core Article II power.

Under this part of the inquiry, factfinding will evaluate the relationship between the actions charged and the President's official responsibilities. The closer the actions to the core of Article II power, the stronger the case for immunity. For example, even lawyerly creativity might be unable to conjure up a hypothetical in which a President would lose immunity for an act taken under the Article II power over foreign affairs. *See, e.g.*, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936); *Zivotofsky v. Kerry*, 576 U.S. 1, 32 (2015). On the other hand, an act of domestic violence in the White House when the President's spouse is also a federal employee should not retain the veil of immunity. The same might be said

for conspiring to obtain the confidential tax information of the President's political enemies and launching audits against them. *See* H. Comm. on the Judiciary*, Impeachment of Richard M. Nixon, President of the United States*, H.R. Rep. No. 93-1305, at 3 (Aug. 20, 1974).

Other constitutional values. The amici States suggest two constitutional values that help illuminate whether a changed act is bound up in an Article II power—the political-question doctrine and the value placed on speech.

In evaluating the charged acts' nexus to Article II powers, a court should account for Article III limits on judicial power as reflected in the political-question doctrine. That doctrine acts as a restraint on federal court's "authority to decide the dispute before it." *Zivotofsky v. Clinton,* 566 U.S. 189, 195 (2012). The doctrine involves the delicate "relationship between the judiciary and the coordinate branches of the Federal Government." *Baker v. Carr*, 369 U.S. 186, 210 (1962). One of those situations is the "unusual need for unquestioning adherence to a political decision already made." *Id.* at 217; *Zivotofsky v. Clinton*, 566 U.S. at 203 (Sotomayor, J., concurring in part and concurring in judgment). Here, the indictment overlaps with the conduct vetted in an impeachment and acquittal. In those rare circumstances, the President's immunity may well be a political question. The final answer would depend on whether the impeachment acquittal covered all the conduct proven in the criminal case.

The point is not that immunity is always a political question, only that it *becomes* a political question when Congress has already used the political process

to evaluate and acquit the exact same conduct. In that way, immunity would operate like the Guaranty Clause, which sometimes poses political questions that the courts will not resolve, and sometimes poses questions that the courts will adjudicate. *Compare, e.g.*, *Luther v. Borden*, 48 U.S. 1 (1849), *with, e.g.*, *Minor v. Happersett*, 88 U.S. 162 (1875); *see also Baker*, 369 U.S. at 222 n.48. Just like the Guaranty Clause, presidential immunity should remain in place if the political process—in *Borden* the executive branch's "determination" of the legitimate government of Rhode Island; here the legislative branch's impeachment acquittal—has already reviewed and rejected the claim brought to court. A decision shielding the President from liability for acquitted conduct would treat presidential immunity as a non-justiciable political question because the political branches had taken up and decided the question for themselves.

Another constitutional value that may shine a light on whether the charged acts are linked to core Article II power is whether those acts are speech. Speech holds a special place in our constitutional history and our constitutional order. "The theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" *United States v. Alvarez*, 567 U.S. 709, 728 (2012) (quoting *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). The First Amendment, of course, does not apply when the government speaks. *See, e.g.*, *Pleasant Grove City v. Summum,* 555 U.S. 460, 467–468 (2009). Instead, it is "the democratic electoral process that first and foremost provides a check on government speech." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). Government speech is both a

product of the democratic process and is accountable to the democratic process when the "government purposefully expresses a message of its own through persons authorized to speak on its behalf," *see Shurtleff v. City of Boston*, 596 U.S. 243, 267 (2022) (Alito, J., concurring in judgment). And when the President speaks, he exercises "high constitutional duties." Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 Harv. L. Rev. 701, 706 (1995). What is more, the President speaks for the nation, and the nation has the power to hold the President to account for that speech. So a prosecution that targets presidential speech targets the President exercising core Article II powers.

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All told, the nexus inquiry asks whether an act charged as a crime lie at Article II's core—in which case immunity is probably per-se—or whether the charged act lies at Article II's "outer perimeter," *Fitzgerald*, 457 U.S. at 757—in which case the court should consider the urgency behind the charged act.

B. The test for whether an act lies beyond the scope of presidential immunity must account for the urgency of the act charged as a crime.

The second key factor in assessing any immunity claim is the urgency of presidential action. Various executive actions responding to the world wars arose from the urgent demand for executive action. *See, e.g.*, Exec. Order No. 2729A (June 15, 1917) (creating the Office of Alien Property Custodian); Exec. Order No. 9215, 7 Fed. Reg. 5205-07, *Authorizing and Directing the Secretary of War to Assume Full Control of Certain*

Airports (Aug. 8, 1942). By contrast, little urgency usually attends a presidential decision to make an appointment or grant a pardon. Yet all of these actions have been questioned as illegal. *See, e.g.*, *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021) (pandemic orders); *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 513 (2014) (appointment); *Ex parte Wells*, 59 U.S. 307 (1855) (pardon). And it is not hard to imagine official action along these lines challenged as criminal. *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486, 555 n.18 (1969) (Opinion of Douglas, J.) (describing allegation of soliciting money to procure pardon); *Mississippi v. Johnson*, 71 U.S. 475 (1866) (challenge to martial law during reconstruction).

To decide whether a President is immune from a criminal charge under this part of the inquiry, fact-finding will determine whether the situation demanded the President's actions. A President seizing property to punish political foes during an election presents a vastly different context than a President seizing property during a war. A President speeding along the highway to meet a golfing buddy is a far different context than a President speeding to the situation room in the White House to orchestrate military operations.

C. The two-factor standard for presidential immunity could operate much like this Court's approach to qualified immunity.

These twin considerations—how tightly the charged act is bound to core Article II powers and the demand for decisive presidential action—would mean that immunity in a given case may not be resolved without fact-finding, and perhaps not without trial.

Indeed, the amici States urge the Court to remand this case for fact-finding consistent with the Court's guidance. But in such a sensitive area, that is a feature of this approach, not a drawback.

Perhaps the most direct analogy that might guide the approach here is the well-developed law of qualified immunity. This Court has certainly stressed the importance of resolving qualified immunity as early as possible. *Pearson v. Callahan*, 555 U.S. 223, 231–32, (2009); *Saucier v. Katz,* 533 U.S. 194, 200–01 (2001). That might mean resolving it at the motion-to-dismiss stage. On the other hand, courts sometimes act too quickly to resolve immunity. *See, e.g.*, *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500 (2019); *Sause v. Bauer*, 585 U.S. 957, 958 (2018). Indeed, many qualified-immunity cases are resolved at summary judgment, after many facts are developed. Courts jump the gun by resolving immunity when the facts need further development. *See, e.g., Lombardo v. City of St. Louis, Missouri*, 143 S. Ct. 2419, 2422 (2023) (Sotomayor, J., dissenting from denial of certiorari). And resolving immunity without factfinding might pretermit a defense that "could succeed" if the proponent attacking immunity "cannot prove the facts he alleges." *Taylor v. Riojas*, 592 U.S. 7, 12 (2020) (Alito, J., concurring in judgment).

These observations track experiences in the circuit courts, which deal with the day-to-day decisions about qualified immunity. "Though rare, trial courts may consider qualified immunity after trial." *Taylor v. City of Milford*, 10 F.4th 800, 812 (7th Cir. 2021). It "may be," in fact, "that the qualified immunity issue can only be resolved at trial," *Sabir v. Williams*, 52 F.4th 51, 65 n.10 (2d Cir. 2022), because "the jury itself decides issues of fact that are determinative of the

qualified immunity defense," *Bailey v. Swindell*, 89 F.4th 1324, 1329 (11th Cir. 2024). For example, there may be "a set of facts, established at trial," that would justify immunity. *Taylor*, 10 F.4th at 812.

On the whole, presidential immunity could operate like qualified immunity: when a question remains about "[w]hether the conduct … actually occurred ..." as alleged, the defense "must be reserved for trial." *Ray v. Roane*, 948 F.3d 222, 228–29 (4th Cir. 2020) (quotation marks omitted; alterations in original). For presidential immunity, a genuine question may linger until after trial about whether the acts charged as crimes have any nexus to official action or a genuine question may remain for trial whether any overriding need justified the President's conduct. Often in criminal cases, all that is known is that much is unknown until trial. Without trial, and the cross-examination that is rightly hailed as "the greatest legal engine ever invented for the discovery of truth," a conclusion about immunity either way will often be premature. *See* John Henry Wigmore, 5 *Evidence in Trials at Common Law* §1367 (J. Chadbourn ed. 1974).

Returning to the presidential-immunity context, imagine the following. A criminal complaint alleges conduct that would be a crime. But as the trial process unfolds, facts may develop that show the conduct related to a core Article II power, like national security, or facts may reveal the justification for urgent action that could not have been disclosed at the time of the acts. The near-limitless variety of circumstances a President must confront amplifies the possibility that some circumstances revealed in the factfinding process will seal the case for immunity that is not apparent at the charging stage.

* * *

If charging ex-Presidents follows the trendline in impeaching Presidents, the immunity question posed here requires this Court's hand to shape a doctrine likely to see increased use. But it also requires restraint so that the doctrine develops incrementally. If "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner,* 256 U.S. 345, 349 (1921) (Holmes, J.), then the relatively blank history to date is a reason to move slowly in this area. But moving slowly does not mean staying silent. At bottom, the amici States ask that the Court set out some guideposts for resolving the "extent" of presidential immunity, but leave for the district court the task of applying the "framework in the first instance." *eBay*, 547 U.S. at 394. Even if the case's current posture "does not require" the Court to "now to apply the principle specifically," setting forth these principles will avoid the appearance that the opinion "may appear to deny" the legitimate breadth of presidential immunity. *Clinton v. Jones*, 520 U.S. at 711 (Breyer, J., concurring). Immunity questions "implicate special concerns regarding the separation of powers" and the D.C. Circuit "did not take adequate account of those concerns." *Mazars*, 591 U.S. at 871. This Court should articulate those concerns, and remand for proceedings consistent with that guidance.

CONCLUSION

The Court should hold that presidential immunity turns on the alleged act's nexus to Article II power and the urgency of the alleged act, and remand this matter for further proceedings and factfinding.

Respectfully submitted,

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MARCH 2024

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