No. 23-939

In the Supreme Court of the United States

DONALD J. TRUMP,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office?

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law, including the integrity of our constitutional structure and the separation of powers. ACLJ Counsel of Record and attorneys have appeared often before this Court as counsel for parties, *e.g.*, *Colorado Republican State Central Committee v. Anderson,* U.S. No. 23-696 (2023); *Trump v. Vance*, 140 S. Ct. 2412 (2020); *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020); *Trump v. Deutsche Bank AG*, No. 19-760 (2019); and *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for *amici*, *e.g.*, *Fischer v. United States*, U.S. No. 23-5572 (2024), and *McDonnell v. United States*, 579 U.S. 550 (2016), addressing various constitutional issues, including those impacted by overaggressive prosecution.

SUMMARY OF ARGUMENT

This Court has already recognized "Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility." *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982). The rationale and concerns supporting former Presidents' immunity

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

from civil damages for official acts, *see Clinton v. Jones*, 520 U.S. 681, 693-94 (1997), equally support immunity from criminal prosecution for official acts.

Providing immunity from criminal prosecution for official acts only temporarily—for one, two, three, or even four years, *i.e.*, while the President is still in office—would significantly undercut the purpose of such immunity, *id.* at 693 ("[I]mmunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability."). It would not assuage the Court's "central concern . . . to avoid rendering the President 'unduly cautious in the discharge of his official duties.'" *Id.* at 693-94 (quoting *Fitzgerald*, 457 U.S. at 752 n.32). Were the President's immunity from criminal prosecution to expire at the end of his term, it would be no true immunity at all, just a deferral.

The President of the United States occupies a unique role, singularly responsible for the actions of the Executive Branch, and is entitled to the legal protections necessary for our government to properly function. *Trump v. Vance*, 140 S. Ct. 2412, 2425 (2020). Among those protections is immunity from civil damages for official acts—which of necessity follows the President even after the conclusion of his tenure. *Fitzgerald*, 457 U.S. at 731. Recognizing that this protection also applies in the criminal context does not place the President above the law. Rather, it is a necessary feature of the effective functioning of our constitutional order. Without it, the President's

conduct would be intolerably constrained by the prospect of potential future liability, even when making the most sensitive and politically charged official decisions.

The lower courts held that a former President may face criminal prosecution for official acts undertaken while in office. This devalues the singular nature of the Presidency, confusing executive *privilege* jurisprudence with that of *immunity*, and legislators and state judges with the President of the United States.

Furthermore, denying former Presidents immunity from criminal prosecution for official acts would encourage prosecution by political adversaries—whether by a successor administration or any number of state and local prosecutors. The potential for criminal inquiries into politically controversial official actions would be enormously disruptive and distracting to the President—and by definition the Executive branch—to the profound detriment of the constitutional structure and the Nation. This Court's repeated warnings against such concerns in the civil context apply with strengthened vigor in the criminal context.

The question presented does not occur in a vacuum. Other public officials enjoy immunity beyond their term of office. *Jones*, 520 U.S. at 693 ("In cases involving prosecutors, legislators, and judges we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear

that a particular decision may give rise to personal liability."). Yet the President, unlike any of these officials, is singularly responsible for the official actions of an entire branch of government. *See Id.* at 712 (Breyer, J., concurring). There is no reason to deny the President immunity for those decisions beyond his term. Indeed, there is every reason to recognize it.

ARGUMENT

This Court has already held that the President is immune from civil liability for his official acts, and that such immunity continues after he leaves office, *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). The reasoning underpinning *Fitzgerald* applies with greater force to the question whether a former President is immune from criminal prosecution for his official acts. This Court should so hold.

I. The President's Role and Function Requires Immunity from Criminal Prosecution for Official Acts Even After the Conclusion of His Tenure.

At the time of the founding, John Adams emphasized that to subject the president to criminal process would be to "put it in the power of a common justice to exercise any authority over him, and stop the whole machine of government." William Maclay, *Sketches of Debate in the First Senate of the United States* 152 (George Harris ed., 1880). That threat will

have the same distorting impact whether realized during, or upon the President's exit from, office. The time has come for this Court to recognize John Adams' principle, a principle that has always been implicit in our constitutional order: the President is immune from liability for his official acts as President. The Court has already embraced a former President's immunity from civil liability. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). The rationale for recognizing a former President's immunity applies with greater force to criminal prosecution for his official acts. There is no meaningful distinction that renders *Fitzgerald*'s reasoning inapplicable to criminal cases; in fact, its justification, a concern that the President would be threatened and hampered by the risk of future liability, applies even more strongly in the criminal context where life and liberty are at issue. Likewise, *Fitzgerald*'s reasoning recognized the importance of protecting the institution of the President from liability, even after the President leaves office.

A. The President's Unique Role in Our Constitutional Structure Requires the Inherent Protection of Immunity for his Official Acts.

Unlike the other branches, the President personifies an entire branch of the United States Government. *United States v. Arthrex, Inc.,* 141 S. Ct. 1970, 1998 (2021) ("At the top [of the Executive Branch] sits the President, in whom the executive power is vested."). Recognizing the special character of the President's position, this Court has developed a body of jurisprudence carefully tailored to protect the

President's *sui generis* function within the constitutional structure in light of his unparalleled impact on the security and wellbeing of the Nation: "[t]he executive power is vested in a president; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution though the impeaching power." *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 610 (1838). The Court has "long recognized the 'unique position in the constitutional scheme' that [the Office of the President] occupies." *Clinton v. Jones*, 520 U.S. 681, 698-99 (1997) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982)); *see id.* at 710-24 (Breyer, J., concurring in judgment).

"No one doubts that Article II guarantees the independence of the Executive Branch. As the head of that branch, the President 'occupies a unique position in the constitutional scheme.' His duties, which range from faithfully executing the laws to commanding the Armed Forces, are of unrivaled gravity and breadth." *Trump v. Vance*, 140 S. Ct. 2412, 2425 (2020) (quoting *Fitzgerald*, 457 U.S. at 749). "Quite appropriately, those duties come with protections that safeguard the President's ability to perform his vital functions." *Id.* (citing *Fitzgerald*, 457 U.S. at 749).

Clearly, "these principles do not mean that the 'President is above the law.'" *Cheney v. United States Dist. Court*, 542 U.S. 367, 382 (2004) (quoting *United States v. Nixon*, 418 U.S. 683, 715 (1974)). Instead, they reflect the manner in which the law protects the unique structure of the three coequal branches of government. For example, in the context of civil

discovery, the Court

> simply acknowledge[s] that the public interest requires that a coequal branch of Government 'afford Presidential confidentiality the greatest protection consistent with the fair administration of justice,' and give[s] recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties."

Id. (quoting *Nixon*, 418 U.S. at 715). In the realm of evidence gathering in criminal proceedings and in cases involving the President's personal papers, "no citizen, not even the President, is categorically above the common duty to produce evidence when called upon in a criminal proceeding." *Vance*, 140 S. Ct. at 2431 (holding sitting President neither absolutely immune from criminal subpoenas seeking his private papers nor entitled to a heightened standard of need); *Nixon*, 418 U.S. at 706-08.

In no circumstance has this Court ever adjudicated cases involving the Presidency in the same manner as ordinary individuals. Our structure of government has always required the Judicial Branch to view the President of the United States through a different lens: "It is well established that 'a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any "ordinary individual."'" *Cheney*, 542 U.S. at 381 (quoting *Nixon*, 418 U.S. at 715). Indeed, "Chief Justice Marshall, sitting as a trial judge, recognized

the unique position of the Executive Branch when he famously stated that 'in no case . . . would a court be required to proceed against the president as against an ordinary individual.'" *Id.* at 381-82 (internal bracket omitted) (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (C.C. Va. 1807)).

This Court's jurisprudence has followed this overall approach, even as it has nuanced its application to the particulars of each type of case implicating the President's unique role and authority. But the President's role is such that in all circumstances, he is treated differently than an ordinary citizen or other government official. And at the heart of this Court's doctrine is the recognition that the President is entitled, due to the very nature of his office, to immunity for his official acts.

B. Recognition of a Former President's Immunity from Criminal Prosecution for Official Acts Is a Natural and Necessary Extension of the Existing Official Acts Immunity Doctrine Recognized by This Court.

This Court has held that *even a former* President enjoys "immunity from damages liability predicated on his official acts." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). *Fitzgerald*'s holding that former Presidents retain immunity from personal damage liability is closely aligned with the question now presented before this Court and should govern the question of criminal liability for the same official acts.

The reason for the post-tenure immunity solidified in *Fitzgerald* and re-acknowledged in *Jones* and

Vance is the key to understanding it: "We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Fitzgerald*, 457 U.S. at 749.

> The President occupies a unique position in the constitutional scheme. Article II, § 1, of the Constitution provides that '[the] executive Power shall be vested in a President of the United States . . . .' This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity.

Id. at 749-50. This reasoning applies more vigorously to criminal prosecution than it does to civil lawsuits; it is based on no specific corollary to civil litigation, but instead the more fundamental principles of separation of powers and the need to protect the role of the Executive.

This Court's holding in *Vance* does no damage to these principles and in fact reaffirms them. *Vance* decided the contours of an evidentiary privilege concerning personal papers vis-à-vis state criminal investigations. *Fitzgerald*, in contrast, decided former Presidents' immunity from civil damages liability for official acts and is what should govern here. The *Vance* Court approvingly noted the *Nixon v. Fitzgerald* rule and underpinned it with the acknowledgment that the President's "duties, which range from faithfully executing the laws to

commanding the Armed Forces, are of unrivaled gravity and breadth." *Trump v. Vance*, 140 S. Ct. 2412, 2425 (2020). The Court continued, "Quite appropriately, those duties come with protections that safeguard the President's ability to perform his vital functions." *Id.*

Vance drew a careful distinction between *evidentiary privileges*, where the President's immunity is more limited, and the contours of the President's immunity from *liability*. The Court emphasized that *Fitzgerald* "drew a careful analogy to the common law absolute immunity of judges and prosecutors, concluding that a President, like those officials, must 'deal fearlessly and impartially with the duties of his office.'" *Id.* at 2426 (quoting *Fitzgerald*, 457 U. S. at 752).

The lower courts erred in this case by failing to properly apprehend this distinction. The D.C. Circuit misapplied *Vance*'s holding and flouted *Fitzgerald*'s when it concluded that the "risks" (expressly identified by this Court in *Nixon v. Fitzgerald* as the primary concern justifying a former President's civil immunity for official acts) "do not overcome 'the public interest in fair and accurate judicial proceedings,' which 'is at its height in the criminal setting.'" *United States v. Trump*, No. 23-3228, 2024 U.S. App. LEXIS 2714, *40 (D.C. Cir. Feb. 6, 2024) (quoting *Vance*, 140 S. Ct. at 2424). But *Vance* pertained to evidentiary privilege, not immunity. Applying *Vance*'s analysis to a *Fitzgerald*-type context simply misunderstands *Vance*.

It is *Fitzgerald*, not *Vance*, that set the rule for presidential *liability* as distinguished from *evidentiary privileges*. And that rule applies *post-*

tenure; otherwise, the President's actions and decision-making *while in office* would still be impacted in a manner inconsistent with the principles this Court has recognized, *i.e.*, the uniqueness of the office "rooted in the constitutional tradition of the separation of powers and supported by our history." *Fitzgerald*, 457 U. S. at 749.

The cases the court below cited to avoid the *Fitzgerald* rule dealt with judicial oversight maintaining the separation of powers or enforcing a ministerial (mandated) act. They lend no support for the tremendous leap to personal criminal liability for an official act. *See Trump*, 2024 U.S. App. LEXIS 2714, at *26-30 (analyzing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-79 (1804); *Mississippi v. Johnson*, 71 U.S. 475, 497-98 (1866); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952)). These cases reveal only the unremarkable proposition that courts can and do have the authority to enter orders that maintain the separation of powers and constrain *ministerial* presidential duties. None of the cases cited by the D.C. Circuit applied criminal penalties to a President, or personal liability at all.

Fitzgerald expressly considered and distinguished the principle and cases upon which the D.C. Circuit premised its ruling. 457 U.S. at 753-54 ("When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, *cf. Youngstown Sheet & Tube Co. v. Sawyer, supra*, or to vindicate the public interest in an ongoing criminal prosecution, *see United States v. Nixon, supra*—the exercise of jurisdiction has been

held warranted."). *Fitzgerald* was clear: judicial orders for the President to act are one thing, the imposition of personal liability is another. The lower court subjects a President to criminal liability and loss of liberty for an official act. No case law supports such a giant leap, and *Fitzgerald* categorically rejects it. And nothing about the *Fitzgerald* decision was contingent on its application to a *civil* context.

Historically, governmental immunity is closely tethered to official acts, and for good reason. Consistent with logic, "[t]he principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct." *Clinton v. Jones*, 520 U.S. 681, 692-93 (1997). Put simply, immunity is meant to protect the official making a decision or taking an action *in his role as an official*. That is why, "[i]n cases involving prosecutors, legislators, and judges," this Court "ha[s] repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability." *Id.* at 693. This rationale is meant to protect the official from legal exposure, whether criminal or civil, because

> [t]he conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification

> for official immunity. The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion.

Id. at 693 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 202-04 (1979)). Or as this Court elsewhere explained, "In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages." *Spalding v. Vilas*, 161 U.S. 483, 498 (1896). This analysis applies with greater force to criminal prosecution.

The D.C. Circuit's opinion misconstrues the cases allowing criminal liability for legislators and judges as grounds for holding that the President enjoys no immunity from criminal prosecution. *See Trump*, 2024 U.S. App. LEXIS 2714, at *32-38 (D.C. Cir. Feb. 6, 2024). The legislator cases are based upon the unique scope of the Speech and Debate Clause, U.S. Const. art. I, § 6, cl. 1; *id.* at *32-33 (citing *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951); *Gravel v. United States*, 408 U.S. 606, 625 (1972); *United States v. Johnson*, 383 U.S. 169, 171 (1966)), and do not apply here.

The cases involving judges present a number of distinguishing factors, namely federal supremacy as to *state* officials' *ultra vires* violations of ministerial duties and acts that were determined to be unofficial in the first place. For example, the lower court relied heavily on *Ex parte Virginia*, 100 U.S. 339 (1879), for

the proposition that a judge's racially discriminatory act exceeded his authority and as such, he could answer criminally. *See Trump*, 2024 U.S. App. LEXIS 2714, *34-35 (citing *Ex parte Virginia*, 100 U.S. 339). But in that case, this Court held that a *state* judge may answer to *federal* criminal statutes enforcing the 13th and 14th Amendments to the U.S. Constitution because, "in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers." *Ex parte Virginia*, 100 U.S. at 346. For this reason, among others, *Ex Parte Virginia* is inapposite.

Neither do the other judge cases cited by the court below support that court's conclusion. *See Trump*, 2024 U.S. App. LEXIS 2714, at *36 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 490-91 (1974)). In *O'Shea*, 17 black and two white residents of Cairo, Illinois, had sought injunctive relief in federal court under 42 U.S.C. §§ 1982, 1983, and 1985 to remedy state judges requiring excessive bail because of race, all against the backdrop of volatile racial tensions in the town. 414 U.S. 488 (1974). This Court allowed the dismissal of the complaint for equitable injunctive relief for lack of standing, *e.g.*, failure to allege irreparable injury. *Id.* at 502.

It also rejected the complaint because other avenues of relief existed, noting that "the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress.'" *Id.* at 503 (quoting *Gravel v. United States*, 408 U.S. 606, 627 (1972)). This case

also pertained to state judges and, regardless, *did not hold* a judge lacked criminal immunity for a judicial act. Instead, it observed a rule it expressly pinned to *Ex parte Virginia*, 100 U.S. 339 (1880), already distinguished above. *Id.* ("[W]e have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. *Cf. Ex parte Virginia*, 100 U.S. 339 (1880)."). *See also Trump*, 2024 U.S. App. LEXIS 2714, at *36-37 (citing *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976)).[2]

This Court has noted that those Presidents "who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.'" *Trump v. Vance*, 140 S. Ct. 2412, 2424 (2020) (quoting *United States v Nixon*, 418 U.S. 683, 705 (1974)). "Confidentiality thus promoted the 'public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.'" *Id.* (quoting *Nixon*, 418 U.S. at 708). This Court astutely recognized this reality as one taught by "[h]uman experience." *Id.*

That human experience and, indeed, common sense, teaches that the same holds true for exposure to future criminal prosecution for official decisions and acts taken while in office. The absence of cases on criminal immunity exists not because Presidents have

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[2] Moreover, other judicial immunity cases cited below pertain to bribery charges, as to which there is an issue whether, at common law, acquiescence to bribery could *ever* constitute an official act. *Id.* at *37-38. But again, the question now before this Court assumes the act is official.

been prosecuted for official acts without issue, but because such prosecutions were essentially unthinkable and so courts simply have had no prior need to apply the *Fitzgerald* rule in this context. But now that the issue has arisen, *Fitzgerald* should govern.

C. Immunity that Expires Is No Immunity at All.

In recognizing immunity, this Court's "central concern was to avoid rendering the President 'unduly cautious in the discharge of his official duties.'" *Clinton v. Jones*, 520 U.S. 681, 693-94 (1997) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 752 n.32 (1982)). Just as it did with respect to civil damages, this central concern applies equally to a President's future criminal exposure for official acts once out of office. To serve its purpose and assuage this Court's "central concern," such immunity *must* follow the President beyond his tenure: criminal exposure for official acts now or later is, after all, still criminal exposure. It defies reason that protections built upon these fundamental concerns would evaporate at the strike of noon on the successor's Inauguration Day. If they did, they are not protections at all.

One of the primary purposes of official act immunity is to avoid the distraction legal proceedings—whether existing or threatened—would impose upon the President and his senior advisors. *Fitzgerald*, 457 U.S. at 751 ("Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the

Nation that the Presidency was designed to serve."). To be sure, a former President no longer bears the weight of the function of Government on his shoulders as he did when he made decisions and met with his advisors in office.

But the structural concern with exposing a former president to liability for his official acts persists still, albeit in another form: "distortion." *Trump v. Vance*, 140 S. Ct. 2412, 2426 (2020) (emphasis added) (quoting *Nixon v. Fitzgerald*, 520 U.S. at 694 n.19). A sitting President's fear of future criminal reprisal upon the conclusion of his term at the hands of partisan adversaries, most certainly, bears influence. It will impact the discharge of his duties while in office. It *will* distort them. The distortion need not arise, as the lower courts naively opined, because of fear of reprisal for the intentional commission of crimes. It will arise out of fear of prosecution for non-criminal, official acts that may be misconstrued, intentionally or not, by a prosecutor employing 20/20 hindsight into the workings of the President as he makes the most difficult, sensitive, and politically fraught decisions facing the Executive Branch. *Contra United States v. Trump*, No. 23-257, 2023 U.S. Dist. LEXIS 215162, *27 (D.D.C. Dec. 1, 2023) ("Every President will face difficult decisions; whether to intentionally commit a federal crime should not be one of them."); *id.* at *26-27 (citing *Clark v. United States*, 289 U.S. 1, 16 (1933), conflating this Court's "central concern" justifying protection of the Office of the President of the United States with the fears of a timid juror); *see United States v. Trump*, No. 23-3228, 2024 U.S. App. LEXIS 2714, at *41 (same).

This Court's jurisprudence emphatically grounded immunity from civil liability upon the "dominant concern" in *Fitzgerald*, which "was *not mere distraction* but *the distortion* of the Executive's 'decisionmaking process' with respect to official acts that would stem from 'worry as to the possibility of damages.'" *Vance*, 140 S. Ct. at 2426 (emphasis added) (quoting *Fitzgerald*, 520 U.S. at 694 n.19). Indeed, "*Fitzgerald* did not hold that distraction was sufficient to confer absolute immunity." *Id.* The President's immunity instead depends on the realization that the President "must 'deal fearlessly and impartially with the duties of his office'—not be made 'unduly cautious in the discharge of [those] duties' by the prospect of civil liability for official acts." *Id.* (quoting *Fitzgerald*, 520 U.S. at 751-52 n.32); *id.* ("[W]e expressly rejected immunity based on distraction alone 15 years later in *Clinton v. Jones*."). And, this central concern *increases*, rather than decreases, in the face of potential criminal prosecution and as *Fitzgerald* made clear, is entirely unaffected by the expiration of the President's term in office.

This does not require the creation of a doctrine from scratch. Rather, the Court should simply and logically recognize that the same reasoning requiring immunity from civil damages for a President's official acts, both during and after his term of office, also requires immunity from criminal liability for those same official acts. No more, no less. And if the logic for the first holds, it must hold as to the second, arguably even more so. While civil damages can be economically devastating, criminal punishment threatens life and liberty. Thus, if the threat of the first's impact on official decision-making can impair

and even endanger the Nation such that immunity is warranted, the threat of the second warrants immunity with even more vigor.

D. Immunity for Civil Acts but not from Criminal Prosecution Makes No Sense.

Under the system the D.C. Circuit envisions, a former President appearing in one courtroom could prevail on a motion to dismiss a civil suit premised on an official act undertaken during his term and walk across the hall to face criminal prosecution for the same official act in another courtroom. That system is nonsensical. An analysis of Presidential immunity from liability should focus on the nature of the act, not the type of the liability sought to be imposed. A President's official acts should not form the basis of either civil liability or criminal prosecution. *See Clinton v. Jones*, 520 U.S. at 695 (explaining immunity based on "the nature of the function performed, not the identity of the actor who performed it" (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988))). In other words, under this Court's precedent, immunity solely depends on whether an act is "official." In contrast, for the court below, immunity now depends on whether an action has been brought through a criminal mechanism instead of a civil one. Many civil wrongs also constitute crimes. For example, conspiring to violate constitutional rights gives rise to civil liability. 42 U.S.C. § 1985 (providing for civil liability for conspiracy to violate rights). It is also a crime. 18 U.S.C. § 241 (making the same conduct criminal). The label should be immaterial to immunity. There is no normative reason why this

Court's central concern of "distortion" of the President's performance of his duties should be sufficient to warrant perpetual immunity from *civil* enforcement but not *criminal*. To hold otherwise would make the immunity dependent on the nature of the allegation, not the act.

To the extent it is argued that criminal liability is weightier than civil liability such that the public interest in accountability is greater, the concomitant criminal penalties are likewise weightier—accelerating the risk of the distortion that was the key rationale for presidential immunity in the first place. Indeed, it is difficult to imagine a President for whom the prospect of monetary liability would have a distorting effect, while the prospect of jail time would not. Moreover, civil damages are not radically different in kind from criminal mechanisms—both have potentially potent chilling, behavior altering, effects. There are alternatives. Recognition of presidential immunity for official acts, of course, leaves multiple means to address government misconduct, such as suits seeking equitable relief, Administrative Procedures Act litigation, or tort claims brought pursuant to the Federal Tort Claims Act.[3] This Court's decisions recognizing former

[3] This Court has emphasized that the right to petition for redress of grievances, which includes a right to access the courts, *see California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), is implied by "the very idea of a government, republican in form." *United States v. Cruikshank*, 92 U.S. 542, 552 (1876). A legitimate civil lawsuit brought against a government or its actor serves a constitutional purpose, even if the damages as against the sovereign inure within the confines of a Federal Tort Claims Act limitations or damages as against an individual are only available if the actor exceeds certain

Presidents' absolute immunity from civil damages for official acts is an important rule that "limits" the public interest in accountability just as much as immunity from criminal prosecution would. But this Court's more central interest in ensuring that the President is not overcome with concern for subsequent legal liability prevails in the civil damages context and should prevail in the criminal context as well.

At the end of the day, if criminal allegations, not fundamentally unlike a plaintiff's civil claim, seek to impose personal liability for official acts of the President, they must be barred by presidential immunity. And that immunity is only meaningful if it survives the President's tenure. This immunity protects no mere private interest, but instead protects the public interest of the people to have their chosen leader able to execute his duties not out of fear of personal reprisal, but "for their benefit."

CONCLUSION

A President should be immune from criminal prosecution for his official acts undertaken during his term of office. And the deleterious impact of potential criminal exposure for official acts applies just as much on 11:59 AM on January 20 as it does at 12:00 PM. Former Presidents must be immune for official acts upon their exit from the presidency just as they were while still in office. That such vital immunity could meaningfully exist and then vanish with the tick-tock of the second hand is absurd. It also does not meaningfully exist if it applies only in civil courts and

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bounds.

not in criminal. This holds true for any President, of any party, and its implications stretch far beyond the result of this case.

This Court should reverse the judgment below.

Respectfully submitted.

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