SUPREME COURT OF THE UNITED STATES

No. 23–939

DONALD J. TRUMP, PETITIONER *v.*
UNITED STATES

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

[July 1, 2024]

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join, dissenting.

Today's decision to grant former Presidents criminal immunity reshapes the institution of the Presidency. It makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law. Relying on little more than its own misguided wisdom about the need for "bold and unhesitating action" by the President, *ante,* at 3, 13, the Court gives former President Trump all the immunity he asked for and more. Because our Constitution does not shield a former President from answering for criminal and treasonous acts, I dissent.

I

The indictment paints a stark portrait of a President desperate to stay in power.

In the weeks leading up to January 6, 2021, then-President Trump allegedly "spread lies that there had been outcome-determinative fraud in the election and that he had actually won," App. 181, Indictment ¶2, despite being "notified repeatedly" by his closest advisers "that his claims were untrue," *id.*, at 188, ¶11.

When dozens of courts swiftly rejected these claims, Trump allegedly "pushed officials in certain states to ignore the popular vote; disenfranchise millions of voters; dismiss

legitimate electors; and ultimately, cause the ascertainment of and voting by illegitimate electors" in his favor. *Id.*, at 185–186, ¶10(a). It is alleged that he went so far as to threaten one state election official with criminal prosecution if the official did not "'find' 11,780 votes" Trump needed to change the election result in that state. *Id.*, at 202, ¶31(f). When state officials repeatedly declined to act outside their legal authority and alter their state election processes, Trump and his co-conspirators purportedly developed a plan to disrupt and displace the legitimate election certification process by organizing fraudulent slates of electors. See *id.*, at 208–209, ¶¶53–54.

As the date of the certification proceeding neared, Trump allegedly also sought to "use the power and authority of the Justice Department" to bolster his knowingly false claims of election fraud by initiating "sham election crime investigations" and sending official letters "falsely claim[ing] that the Justice Department had identified significant concerns that may have impacted the election outcome" while "falsely present[ing] the fraudulent electors as a valid alternative to the legitimate electors." *Id.*, at 186–187, ¶10(c). When the Department refused to do as he asked, Trump turned to the Vice President. Initially, he sought to persuade the Vice President "to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." *Id.*, at 187, ¶10(d). When persuasion failed, he purportedly "attempted to use a crowd of supporters that he had gathered in Washington, D. C., to pressure the Vice President to fraudulently alter the election results." *Id.*, at 221, ¶86.

Speaking to that crowd on January 6, Trump "falsely claimed that, based on fraud, the Vice President could alter the outcome of the election results." *Id.*, at 229, ¶104(a). When this crowd then "violently attacked the Capitol and halted the proceeding," *id.*, at 188, ¶10(e), Trump allegedly

delayed in taking any step to rein in the chaos he had unleashed. Instead, in a last desperate ploy to hold onto power, he allegedly "attempted to exploit the violence and chaos at the Capitol" by pressuring lawmakers to delay the certification of the election and ultimately declare him the winner. *Id.*, at 233, ¶119. That is the backdrop against which this case comes to the Court.

II

The Court now confronts a question it has never had to answer in the Nation's history: Whether a former President enjoys immunity from federal criminal prosecution. The majority thinks he should, and so it invents an atextual, ahistorical, and unjustifiable immunity that puts the President above the law.

The majority makes three moves that, in effect, completely insulate Presidents from criminal liability. First, the majority creates absolute immunity for the President's exercise of "core constitutional powers." *Ante,* at 6. This holding is unnecessary on the facts of the indictment, and the majority's attempt to apply it to the facts expands the concept of core powers beyond any recognizable bounds. In any event, it is quickly eclipsed by the second move, which is to create expansive immunity for all "official act[s]." *Ante,* at 14. Whether described as presumptive or absolute, under the majority's rule, a President's use of any official power for any purpose, even the most corrupt, is immune from prosecution. That is just as bad as it sounds, and it is baseless. Finally, the majority declares that evidence concerning acts for which the President is immune can play no role in any criminal prosecution against him. See *ante,* at 30–32. That holding, which will prevent the Government from using a President's official acts to prove knowledge or intent in prosecuting private offenses, is nonsensical.

Argument by argument, the majority invents immunity

through brute force. Under scrutiny, its arguments crumble. To start, the majority's broad "official acts" immunity is inconsistent with text, history, and established understandings of the President's role. See Part III, *infra*. Moreover, it is deeply wrong, even on its own functionalist terms. See Part IV, *infra*. Next, the majority's "core" immunity is both unnecessary and misguided. See Part V, *infra*. Furthermore, the majority's illogical evidentiary holding is unprecedented. See Part VI, *infra*. Finally, this majority's project will have disastrous consequences for the Presidency and for our democracy. See Part VII, *infra*.

III

The main takeaway of today's decision is that all of a President's official acts, defined without regard to motive or intent, are entitled to immunity that is "at least . . . *presumptive*," and quite possibly "absolute." *Ante,* at 14. Whenever the President wields the enormous power of his office, the majority says, the criminal law (at least presumptively) cannot touch him. This official-acts immunity has "no firm grounding in constitutional text, history, or precedent." *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. 215, 280 (2022). Indeed, those "standard grounds for constitutional decisionmaking," *id.*, at 279, all point in the opposite direction. No matter how you look at it, the majority's official-acts immunity is utterly indefensible.

A

The majority calls for a "careful assessment of the scope of Presidential power under the Constitution." *Ante,* at 5. For the majority, that "careful assessment" does not involve the Constitution's text. I would start there.

The Constitution's text contains no provision for immunity from criminal prosecution for former Presidents. Of course, "the silence of the Constitution on this score is not

dispositive." *United States* v. *Nixon*, 418 U. S. 683, 706, n. 16 (1974). Insofar as the majority rails against the notion that a "'specific textual basis'" is required, *ante,* at 37 (quoting *Nixon* v. *Fitzgerald*, 457 U. S. 731, 750, n. 31 (1982)), it is attacking an argument that has not been made here. The omission in the text of the Constitution is worth noting, however, for at least three reasons.

First, the Framers clearly knew how to provide for immunity from prosecution. They did provide a narrow immunity for legislators in the Speech or Debate Clause. See Art. I, §6, cl. 1 ("Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place"). They did not extend the same or similar immunity to Presidents.

Second, "some state constitutions at the time of the Framing specifically provided 'express criminal immunities' to sitting governors." Brief for Scholars of Constitutional Law as *Amici Curiae* 4 (quoting S. Prakash, Prosecuting and Punishing Our Presidents, 100 Tex. L. Rev. 55, 69 (2021)). The Framers chose not to include similar language in the Constitution to immunize the President. If the Framers "had wanted to create some constitutional privilege to shield the President . . . from criminal indictment," they could have done so. Memorandum from R. Rotunda to K. Starr re: Indictability of the President 18 (May 13, 1998). They did not.

Third, insofar as the Constitution does speak to this question, it actually contemplates some form of criminal liability for former Presidents. The majority correctly rejects Trump's argument that a former President cannot be prosecuted unless he has been impeached by the House and convicted by the Senate for the same conduct. See *ante,* at 32–

34; Part IV–C, *infra*. The majority ignores, however, that the Impeachment Judgment Clause cuts against its own position. That Clause presumes the availability of criminal process as a backstop by establishing that an official impeached and convicted by the Senate "shall *nevertheless* be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." Art. I, §3, cl. 7 (emphasis added). That Clause clearly contemplates that a former President may be subject to criminal prosecution for the same conduct that resulted (or could have resulted) in an impeachment judgment—including conduct such as "Bribery," Art. II, §4, which implicates official acts almost by definition.[1]

B

Aware of its lack of textual support, the majority points out that this Court has "recognized Presidential immunities and privileges 'rooted in the constitutional tradition of the separation of powers and supported by our history.'" *Ante*, at 10 (quoting *Fitzgerald*, 457 U. S., at 749). That is true, as far as it goes. Nothing in our history, however, supports the majority's entirely novel immunity from criminal prosecution for official acts.

The historical evidence that exists on Presidential immunity from criminal prosecution cuts decisively against it. For instance, Alexander Hamilton wrote that former Presidents would be "liable to prosecution and punishment in the ordinary course of law." The Federalist No. 69, p. 452 (J. Harv. Lib. ed. 2009). For Hamilton, that was an important distinction between "the king of Great Britain," who was "sacred and inviolable," and the "President of the United States," who "would be amenable to personal punishment

[1] Article II, §4, provides: "The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

and disgrace." *Id.*, at 458. In contrast to the king, the President should be subject to "personal responsibility" for his actions, "stand[ing] upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware," whose State Constitutions gave them some immunity. *Id.*, at 452.

At the Constitutional Convention, James Madison, who was aware that some state constitutions provided governors immunity, proposed that the Convention "conside[r] what privileges ought to be allowed to the Executive." 2 Records of the Federal Convention of 1787, p. 503 (M. Farrand ed. 1911). There is no record of any such discussion. *Ibid.* Delegate Charles Pinckney later explained that "[t]he Convention which formed the Constitution well knew" that "no subject had been more abused than privilege," and so it "determined to . . . limi[t] privilege to what was necessary, and no more." 3 *id.*, at 385. "No privilege . . . was intended for [the] Executive." *Ibid.*[2]

Other commentators around the time of the Founding observed that federal officials had no immunity from prosecution, drawing no exception for the President. James Wilson recognized that federal officers who use their official powers to commit crimes "may be tried by their country; and if their criminality is established, the law will punish. A grand jury may present, a petty jury may convict, and the judges will pronounce the punishment." 2 Debates on the Constitution 177 (J. Elliot ed. 1836). A few decades later, Justice Story evinced the same understanding. He explained that, when

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[2] To note, as the majority does, see *ante*, at 39, that this Court has recognized civil immunities arguably inconsistent with this view is not to say that Pinckney was wrong about what the Framers had "intended." Indeed, Pinckney's contemporaries shared the same view during the ratification debates. See, *e.g.*, 4 Debates on the Constitution 109 (J. Elliot ed. 1836) (J. Iredell) ("If the President does a single act by which the people are prejudiced, he is punishable himself. . . . If he commits any crime, he is punishable by the laws of his country").

a federal official commits a crime in office, "it is indispensable, that provision should be made, that the common tribunals of justice should be at liberty to entertain jurisdiction of the offence, for the purpose of inflicting, the common punishment applicable to unofficial offenders." 2 Commentaries on the Constitution of the United States §780, pp. 250–251 (1833). Without a criminal trial, he explained, "the grossest official offenders might escape without any substantial punishment, even for crimes, which would subject their fellow citizens to capital punishment." *Id.*, at 251.

This historical evidence reinforces that, from the very beginning, the presumption in this Nation has always been that no man is free to flout the criminal law. The majority fails to recognize or grapple with the lack of historical evidence for its new immunity. With nothing on its side of the ledger, the most the majority can do is claim that the historical evidence is a wash. See *ante,* at 38–39. It claims that the Court previously has described the "relevant historical evidence on the question of Presidential immunity" as "'fragmentary'" and not worthy of consideration. *Ante,* at 38 (quoting *Fitzgerald*, 457 U. S., at 752, n. 31). Yet the Court has described only the evidence regarding "the President's immunity *from damages liability*" as "fragmentary." *Fitzgerald*, 457 U. S., at 751–752, n. 31 (emphasis added). Moreover, far from dismissing that evidence as irrelevant, the *Fitzgerald* Court was careful to note that "[t]he best historical evidence clearly support[ed]" the immunity from damages liability that it recognized, and it relied in part on that historical evidence to overcome the lack of any textual basis for its immunity. *Id.*, at 152, n. 31. The majority ignores this reliance. It seems history matters to this Court only when it is convenient. See, *e.g.*, *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U. S. 1 (2022); *Dobbs*, 597 U. S. 215.

C

Our country's history also points to an established understanding, shared by both Presidents and the Justice Department, that former Presidents are answerable to the criminal law for their official acts. Cf. *Chiafalo* v. *Washington*, 591 U. S. 578, 592–593 (2020) ("'Long settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions'" (quoting *The Pocket Veto Case*, 279 U. S. 655, 689 (1929))). Consider Watergate, for example. After the Watergate tapes revealed President Nixon's misuse of official power to obstruct the Federal Bureau of Investigation's investigation of the Watergate burglary, President Ford pardoned Nixon. Both Ford's pardon and Nixon's acceptance of the pardon necessarily "rested on the understanding that the former President faced potential criminal liability." Brief for United States 15; see also Public Papers of the Presidents, Gerald R. Ford, Vol. 1, Sept. 8, 1974, p. 103 (1975) (granting former President Nixon a "full, free, and absolute pardon . . . for all offenses against the United States which he . . . has committed or may have committed or taken part in during" his Presidency); R. Nixon, Statement by Former President Richard Nixon to P. Buchen, Counsel to President Ford, p. 1 (Sept. 8, 1974) (accepting "full and absolute pardon for any charges which might be brought against me for actions taken during the time I was President of the United States").

Subsequent special counsel and independent counsel investigations have also operated on the assumption that the Government can criminally prosecute former Presidents for their official acts, where they violate the criminal law. See, *e.g.*, 1 L. Walsh, Final Report of the Independent Counsel for Iran/Contra Matters: Investigations and Prosecutions 445 (1993) ("[B]ecause a President, and certainly a past President, is subject to prosecution . . . the conduct of Pres-

ident Reagan in the Iran/contra matter was reviewed by Independent Counsel against the applicable statutes. It was concluded that [his] conduct fell well short of criminality which could be successfully prosecuted").

Indeed, Trump's own lawyers during his second impeachment trial assured Senators that declining to impeach Trump for his conduct related to January 6 would not leave him "in any way above the law." 2 Proceedings of the U. S. Senate in the Impeachment Trial of Donald John Trump, S. Doc. 117–2, p. 144 (2021). They insisted that a former President "is like any other citizen and can be tried in a court of law." *Ibid.*; see also 1 *id.*, S. Doc. 117–3, at 339 (Trump's impeachment counsel stating that "no former officeholder is immune" from the judicial process "for investigation, prosecution, and punishment"); *id.*, at 322–323 (Trump's impeachment counsel stating: "If my colleagues on this side of the Chamber actually think that President Trump committed a criminal offense . . . [a]fter he is out of office, you go and arrest him"). Now that Trump is facing criminal charges for those acts, though, the tune has changed. Being treated "like any other citizen" no longer seems so appealing.

In sum, the majority today endorses an expansive vision of Presidential immunity that was never recognized by the Founders, any sitting President, the Executive Branch, or even President Trump's lawyers, until now. Settled understandings of the Constitution are of little use to the majority in this case, and so it ignores them.

IV

A

Setting aside this evidence, the majority announces that former Presidents are "absolute[ly]," or "at least . . . presumptive[ly]," immune from criminal prosecution for all of their official acts. *Ante,* at 14 (emphasis omitted). The majority purports to keep us in suspense as to whether this

immunity is absolute or presumptive, but it quickly gives up the game. It explains that, "[a]t a minimum, the President must . . . be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose *no 'dangers of intrusion* on the authority and functions of the Executive Branch.'" *Ibid.* (emphasis added). No dangers, none at all. It is hard to imagine a criminal prosecution for a President's official acts that would pose no dangers of intrusion on Presidential authority in the majority's eyes. Nor should that be the standard. Surely some intrusions on the Executive may be "justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977). Other intrusions may be justified by the "primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *United States* v. *Nixon*, 418 U. S. 683, 707 (1974). According to the majority, however, any incursion on Executive power is too much. When presumptive immunity is this conclusive, the majority's indecision as to "whether [official-acts] immunity must be absolute" or whether, instead, "presumptive immunity is sufficient," *ante,* at 6, hardly matters.

Maybe some future opinion of this Court will decide that presumptive immunity is "sufficient," *ibid.*, and replace the majority's ironclad presumption with one that makes the difference between presumptive and absolute immunity meaningful. Today's Court, however, has replaced a presumption of equality before the law with a presumption that the President is above the law for all of his official acts.

Quick on the heels of announcing this astonishingly broad official-acts immunity, the majority assures us that a former President can still be prosecuted for "unofficial acts." *Ante,* at 15. Of course he can. No one has questioned the ability to prosecute a former President for unofficial (other-

wise known as private) acts. Even Trump did not claim immunity for such acts and, as the majority acknowledges, such an immunity would be impossible to square with *Clinton* v. *Jones*, 520 U. S. 681 (1997). See *ante*, at 15. This unremarkable proposition is no real limit on today's decision. It does not hide the majority's embrace of the most far-reaching view of Presidential immunity on offer.

In fact, the majority's dividing line between "official" and "unofficial" conduct narrows the conduct considered "unofficial" almost to a nullity. It says that whenever the President acts in a way that is "'not manifestly or palpably beyond [his] authority,'" he is taking official action. *Ante,* at 17 (quoting *Blassingame* v. *Trump*, 87 F. 4th 1, 13 (CADC 2023)). It then goes a step further: "In dividing official from unofficial conduct, courts may not inquire into the President's motives." *Ante,* at 18. It is one thing to say that motive is irrelevant to questions regarding the scope of civil liability, but it is quite another to make it irrelevant to questions regarding criminal liability. Under that rule, any use of official power for any purpose, even the most corrupt purpose indicated by objective evidence of the most corrupt motives and intent, remains official and immune. Under the majority's test, if it can be called a test, the category of Presidential action that can be deemed "unofficial" is destined to be vanishingly small.

Ultimately, the majority pays lip service to the idea that "[t]he President, charged with enforcing federal criminal laws, is not above them," *ante,* at 13–14, but it then proceeds to place former Presidents beyond the reach of the federal criminal laws for any abuse of official power.

B

So how does the majority get to its rule? With text, history, and established understanding all weighing against it, the majority claims just one arrow in its quiver: the balancing test in *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1983). Yet

even that test cuts against it. The majority concludes that official-acts immunity "is required to safeguard the independence and effective functioning of the Executive Branch," *ante,* at 14, by rejecting that Branch's own protestations that such immunity is not at all required and would in fact be harmful, see Brief for United States 18–24, 29–30. In doing so, it decontextualizes *Fitzgerald*'s language, ignores important qualifications, and reaches a result that the *Fitzgerald* Court never would have countenanced.

In *Fitzgerald*, plaintiff A. Ernest Fitzgerald sued then-former President Nixon for money damages. He claimed that, while in office, Nixon had been involved in unlawfully firing him from his government job. See 457 U. S., at 733–741. The question for the Court was whether a former President had immunity from such a civil suit. The Court explained that it was "settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." *Id.*, at 753–754. To determine whether a particular type of suit against a President (or former President) could be heard, a court "must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." *Id.*, at 754. The Court explained that, "[w]hen 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, or to vindicate the public interest in an ongoing criminal prosecution—the exercise of jurisdiction has been held warranted." *Ibid.* (citations omitted).

On the facts before it, the Court concluded that a "merely private suit for damages based on a President's official acts" did not serve those interests. *Ibid.* The Court reasoned that the "visibility of [the President's] office and the effect of his actions on countless people" made him an easy target for civil suits that "frequently could distract [him] from his

public duties." *Id.*, at 753. The public interest in such private civil suits, the Court concluded, was comparatively weak. See *id.*, at 754, n. 37 ("[T]here is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions"). Therefore, the Court held that a former President was immune from such suits. *Ibid.*

In the context of a federal criminal prosecution of a former President, however, the danger to the functioning of the Executive Branch is much reduced. Further, as every member of the *Fitzgerald* Court acknowledged, see Part IV–B–2, *infra*, the public interest in a criminal prosecution is far weightier. Applying the *Fitzgerald* balancing here should yield the opposite result. Instead, the majority elides any difference between civil and criminal immunity, granting Trump the same immunity from criminal prosecution that Nixon enjoyed from an unlawful termination suit. That is plainly wrong.

1

The majority relies almost entirely on its view of the danger of intrusion on the Executive Branch, to the exclusion of the other side of the balancing test. Its analysis rests on a questionable conception of the President as incapable of navigating the difficult decisions his job requires while staying within the bounds of the law. It also ignores the fact that he receives robust legal advice on the lawfulness of his actions.

The majority says that the danger "of intrusion on the authority and functions of the Executive Branch" posed by criminally prosecuting a former President for official conduct "is akin to, indeed greater than, what led us to recognize absolute Presidential immunity from civil damages liability—that the President would be chilled from taking the 'bold and unhesitating action' required of an independent Executive." *Ante,* at 13 (quoting *Fitzgerald*, 457 U. S., at 745). It is of course important that the President be able to

"'"deal fearlessly and impartially with" the duties of his office.'" *Ante,* at 10 (quoting *Fitzgerald*, 457 U. S., at 752). If every action the President takes exposes him personally to vexatious private litigation, the possibility of hamstringing Presidential decisionmaking is very real. Yet there are many facets of criminal liability, which the majority discounts, that make it less likely to chill Presidential action than the threat of civil litigation.

First, in terms of probability, the threat of criminal liability is much smaller. In *Fitzgerald*, the threat of vexatious civil litigation loomed large. The Court observed that, given the "visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages." *Id.*, at 753. Although "'the effect of [the President's] actions on countless people' could result in untold numbers of private plaintiffs suing for damages based on any number of Presidential acts" in the civil context, the risk in the criminal context is "only that a former President may face one federal prosecution, in one jurisdiction, for each criminal offense allegedly committed while in office." 2023 WL 8359833, *9 (DC, Dec. 1, 2023) (quoting *Fitzgerald*, 457 U. S., at 753). The majority's bare assertion that the burden of exposure to federal criminal prosecution is more limiting to a President than the burden of exposure to civil suits does not make it true, and it is not persuasive.

Second, federal criminal prosecutions require "robust procedural safeguards" not found in civil suits. 2023 WL 8359833, *10. The criminal justice system has layers of protections that "filter out insubstantial legal claims," whereas civil litigation lacks "analogous checks." *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 386 (2004). To start, Justice Department policy requires scrupulous and impartial prosecution, founded on both the facts and the law. See generally Dept. of Justice, Justice Manual §9–27.000 (Principles of Federal Prosecution) (June 2023). The

grand jury provides an additional check on felony prosecutions, acting as a "buffer or referee between the Government and the people," to ensure that the charges are well-founded. *United States* v. *Williams*, 504 U. S. 36, 47 (1992); see also *Harlow* v. *Fitzgerald*, 457 U. S. 800, 826, n. 6 (1982) (Burger, C. J., dissenting) ("[A] criminal prosecution cannot be commenced absent careful consideration by a grand jury at the request of a prosecutor; the same check is not present with respect to the commencement of civil suits in which advocates are subject to no realistic accountability").

If the prosecution makes it past the grand jury, then the former President still has all the protections our system provides to criminal defendants. If the former President has an argument that a particular statute is unconstitutional as applied to him, then he can move to dismiss the charges on that ground. Indeed, a former President is likely to have legal arguments that would be unavailable to the average criminal defendant. For example, he may be able to rely on a public-authority exception from particular criminal laws,[3] or an advice-of-the-Attorney-General defense, see Tr. of Oral Arg. 107–108.[4]

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[3] See *Nardone* v. *United States*, 302 U. S. 379, 384 (1937) (explaining that public officers may be "impliedly excluded from [statutory] language embracing all persons" if reading the statute to include such officers "would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm"); see also Memorandum from D. Barron, Acting Assistant Atty. Gen., Office of Legal Counsel, to E. Holder, Atty. Gen., Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi 12 (July 16, 2010) (interpreting criminal statute prohibiting unlawful killings "to incorporate the public authority justification, which can render lethal action carried out by a government official lawful in some circumstances").

[4] Trump did not raise those defenses in this case, and the immunity that the majority has created likely will obviate the need to raise them in future cases. Yet those defenses would have protected former Presidents from unwarranted criminal prosecutions much more precisely than the blanket immunity the majority creates today.

If the case nonetheless makes it to trial, the Government will bear the burden of proving every element of the alleged crime beyond a reasonable doubt to a unanimous jury of the former President's fellow citizens. See *United States* v. *Gaudin*, 515 U. S. 506, 510 (1995). If the Government manages to overcome even that significant hurdle, then the former President can appeal his conviction, and the appellate review of his claims will be "'particularly meticulous.'" *Trump* v. *Vance*, 591 U. S. 786, 809 (2020) (quoting *Nixon*, 418 U. S., at 702). He can ultimately seek this Court's review, and if past practice (including in this case) is any indication, he will receive it.

In light of these considerable protections, the majority's fear that "'bare allegations of malice,'" *ante,* at 18 (alteration omitted), would expose former Presidents to trial and conviction is unfounded. Bare allegations of malice would not make it out of the starting gate. Although a private civil action may be brought based on little more than "'intense feelings,'" *ante,* at 11 (quoting *Fitzgerald*, 457 U. S., at 752), a federal criminal prosecution is made of firmer stuff. Certainly there has been, on occasion, great feelings of animosity between incoming and outgoing Presidents over the course of our country's history. Yet it took allegations as grave as those at the center of this case to have the first federal criminal prosecution of a former President. That restraint is telling.

Third, because of longstanding interpretations by the Executive Branch, every sitting President has so far believed himself under the threat of criminal liability after his term in office and nevertheless boldly fulfilled the duties of his office. The majority insists that the threat of criminal sanctions is "more likely to distort Presidential decisionmaking than the potential payment of civil damages." *Ante,* at 13. If that is right, then that distortion has been shaping Presidential decisionmaking since the earliest days of the Republic. Although it makes sense to avoid "diversion of the

President's attention during the decisionmaking process" with "needless worry," *Clinton*, 520 U. S., at 694, n. 19, one wonders why requiring some small amount of his attention (or his legal advisers' attention) to go towards complying with federal criminal law is such a great burden. If the President follows the law that he must "take Care" to execute, Art. II, §3, he has not been rendered "'unduly cautious,'" *ante,* at 10 (quoting *Fitzgerald*, 457 U. S., at 752, n. 32). Some amount of caution is necessary, after all. It is a far greater danger if the President feels empowered to violate federal criminal law, buoyed by the knowledge of future immunity. I am deeply troubled by the idea, inherent in the majority's opinion, that our Nation loses something valuable when the President is forced to operate within the confines of federal criminal law.

So what exactly is the majority worried about deterring when it expresses great concern for the "deterrent" effect that "the threat of trial, judgment, and imprisonment" would pose? *Ante,* at 13. It cannot possibly be the deterrence of acts that are truly criminal. Nor does it make sense for the majority to wring its hands over the possibility that Presidents might stop and think carefully before taking action that borders on criminal. Instead, the majority's main concern could be that Presidents will be deterred from taking necessary and lawful action by the fear that their successors might pin them with a baseless criminal prosecution—a prosecution that would almost certainly be doomed to fail, if it even made it out of the starting gate. See *ante,* at 40. The Court should not have so little faith in this Nation's Presidents. As this Court has said before in the context of criminal proceedings, "'[t]he chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice.'" *Nixon*, 418 U. S., at 712, n. 20 (quoting *Clark* v. *United States*, 289 U. S. 1, 16 (1933)). The concern that countless

(and baseless) civil suits would hamper the Executive may have been justified in *Fitzgerald*, but a well-founded federal criminal prosecution poses no comparable danger to the functioning of the Executive Branch.

2

At the same time, the public interest in a federal criminal prosecution of a former President is vastly greater than the public interest in a private individual's civil suit. All nine Justices in *Fitzgerald* explicitly recognized that distinction. The five-Justice majority noted that there was a greater public interest "in criminal prosecutions" than in "actions for civil damages." 457 U. S., at 754, n. 37. Chief Justice Burger's concurrence accordingly emphasized that the majority's immunity was "limited to civil damages claims," rather than "*criminal* prosecution." *Id.*, at 759–760. The four dissenting Justices agreed that a "contention that the President is immune from criminal prosecution in the courts," if ever made, would not "be credible." *Id.*, at 780 (White, J., dissenting). At the very least, the *Fitzgerald* Court did not expect that its balancing test would lead to the same outcome in the criminal context.

The public's interest in prosecution is transparent: a federal prosecutor herself acts on behalf of the United States. Even the majority acknowledges that the "[f]ederal criminal laws seek to redress 'a wrong to the public' as a whole, not just 'a wrong to the individual,'" *ante,* at 13 (quoting *Huntington* v. *Attrill*, 146 U. S. 657, 668 (1892)), such that there is "a compelling 'public interest in fair and effective law enforcement,'" *ante,* at 13 (quoting *Vance*, 591 U. S., at 808). Indeed, "our historic commitment to the rule of law" is "nowhere more profoundly manifest than in our view that . . . 'guilt shall not escape or innocence suffer.'" *Nixon*, 418 U. S., at 708–709 (quoting *Berger* v. *United States*, 295 U. S. 78, 88 (1935)).

The public interest in criminal prosecution is particularly

strong with regard to officials who are granted some degree of civil immunity because of their duties. It is in those cases where the public can see that officials exercising power under public trust remain on equal footing with their fellow citizens under the criminal law. See, *e.g.*, *O'Shea* v. *Littleton*, 414 U. S. 488, 503 (1974) ("[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"); *Dennis* v. *Sparks*, 449 U. S. 24, 31 (1980) ("[J]udicial immunity was not designed to insulate the judiciary from all aspects of public accountability. Judges are immune from §1983 damages actions, but they are subject to criminal prosecutions as are other citizens"); *Imbler* v. *Pachtman*, 424 U. S. 409, 428–429 (1976) ("We emphasize that the [civil] immunity of prosecutors . . . does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally").

The public interest in the federal criminal prosecution of a former President alleged to have used the powers of his office to commit crimes may be greater still. "[T]he President . . . represent[s] all the voters in the Nation," and his powers are given by the people under our Constitution. *Anderson* v. *Celebrezze*, 460 U. S. 780, 795 (1983). When Presidents use the powers of their office for personal gain or as part of a criminal scheme, every person in the country has an interest in that criminal prosecution. The majority overlooks that paramount interest entirely.

Finally, the question of federal criminal immunity for a former President "involves a countervailing Article II consideration absent in *Fitzgerald*": recognizing such an im-

munity "would frustrate the Executive Branch's enforcement of the criminal law." Brief for United States 19. The President is, of course, entrusted with "'supervisory and policy responsibilities of utmost discretion and sensitivity.'" *Ante* at 10 (quoting *Fitzgerald*, 457 U. S., at 750). One of the most important is "enforcement of federal law," as "it is the President who is charged constitutionally to 'take Care that the Laws be faithfully executed.'" *Id.*, at 750 (quoting Art. II, §3). The majority seems to think that allowing former Presidents to escape accountability for breaking the law while disabling the current Executive from prosecuting such violations somehow respects the independence of the Executive. It does not. Rather, it diminishes that independence, exalting occupants of the office over the office itself. There is a twisted irony in saying, as the majority does, that the person charged with "tak[ing] Care that the Laws be faithfully executed" can break them with impunity.

In the case before us, the public interest and countervailing Article II interest are particularly stark. The public interest in this criminal prosecution implicates both "[t]he Executive Branch's interest in upholding Presidential elections and vesting power in a new President under the Constitution" as well as "the voters' interest in democratically selecting their President." 91 F. 4th 1173, 1195 (CADC 2024) (*per curiam*). It also, of course, implicates Congress's own interest in regulating conduct through the criminal law. Cf. *Fitzgerald*, 457 U. S., at 749, n. 27 (noting that the case did not involve "affirmative action by Congress"). Yet the majority believes that a President's anxiety over prosecution overrides the public's interest in accountability and negates the interests of the other branches in carrying out their constitutionally assigned functions. It is, in fact, the majority's position that "boil[s] down to ignoring the Constitution's separation of powers." *Ante,* at 40.

C

Finally, in an attempt to put some distance between its official-acts immunity and Trump's requested immunity, the majority insists that "Trump asserts a far broader immunity than the limited one [the majority has] recognized." *Ante*, at 32. If anything, the opposite is true. The only part of Trump's immunity argument that the majority rejects is the idea that "the Impeachment Judgment Clause requires that impeachment and Senate conviction precede a President's criminal prosecution." *Ibid.* That argument is obviously wrong. See *ante*, at 32–34. Rejecting it, however, does not make the majority's immunity narrower than Trump's. Inherent in Trump's Impeachment Judgment Clause argument is the idea that a former President who was impeached in the House and convicted in the Senate for crimes involving his official acts could then be prosecuted in court for those acts. See Brief for Petitioner 22 ("The Founders thus adopted a carefully balanced approach that permits the criminal prosecution of a former President for his official acts, but only if that President is first impeached by the House and convicted by the Senate"). By extinguishing that path to overcoming immunity, however nonsensical it might be, the majority arrives at an official-acts immunity even more expansive than the one Trump argued for. On the majority's view (but not Trump's), a former President whose abuse of power was so egregious and so offensive even to members of his own party that he was impeached in the House and convicted in the Senate still would be entitled to "at least presumptive" criminal immunity for those acts.

V

Separate from its official-acts immunity, the majority recognizes absolute immunity for "conduct within [the President's] exclusive sphere of constitutional authority." *Ante,* at 9. Feel free to skip over those pages of the majority's

opinion. With broad official-acts immunity covering the field, this ostensibly narrower immunity serves little purpose. In any event, this case simply does not turn on conduct within the President's "exclusive sphere of constitutional authority," and the majority's attempt to apply a core immunity of its own making expands the concept of "core constitutional powers," *ante,* at 6, beyond any recognizable bounds.

The idea of a narrow core immunity might have some intuitive appeal, in a case that actually presented the issue. If the President's power is "conclusive and preclusive" on a given subject, then Congress should not be able to "ac[t] upon the subject." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 638 (1952) (Jackson, J., concurring). In his *Youngstown* concurrence, Justice Robert Jackson posited that the President's "power of removal in executive agencies" seemed to fall within this narrow category. *Ibid.*, n. 4. Other decisions of this Court indicate that the pardon power also falls in this category, see *United States* v. *Klein*, 13 Wall. 128, 147 (1872) ("To the executive alone is intrusted the power of pardon; and it is granted without limit"), as does the power to recognize foreign countries, see *Zivotofsky* v. *Kerry*, 576 U. S. 1, 32 (2015) (holding that the President has "exclusive power . . . to control recognition determinations").

In this case, however, the question whether a former President enjoys a narrow immunity for the "exercise of his core constitutional powers," *ante,* at 6, has never been at issue, and for good reason: Trump was not criminally indicted for taking actions that the Constitution places in the unassailable core of Executive power. He was not charged, for example, with illegally wielding the Presidency's pardon power or veto power or appointment power or even removal power. Instead, Trump was charged with a conspiracy to commit fraud to subvert the Presidential election. It is true that the detailed indictment in this case alleges that Trump

threatened to remove an Acting Attorney General who would not carry out his scheme. See, *e.g.*, App. 216–217, Indictment ¶¶74, 77. Yet it is equally clear that the Government does not seek to "impose criminal liability on the [P]resident for exercising or talking about exercising the appointment and removal power." Tr. of Oral Arg. 127. If that were the majority's concern, it could simply have said that the Government cannot charge a President's threatened use of the removal power as an overt act in the conspiracy. It says much more.

The core immunity that the majority creates will insulate a considerably larger sphere of conduct than the narrow core of "conclusive and preclusive" powers that the Court previously has recognized. The first indication comes when the majority includes the President's broad duty to "'take Care that the Laws be faithfully executed'" among the core functions for which a former President supposedly enjoys absolute immunity. *Ante,* at 20 (quoting Art. II, §3). That expansive view of core power will effectively insulate all sorts of noncore conduct from criminal prosecution. Were there any question, consider how the majority applies its newly minted core immunity to the allegations in this case. It concludes that "Trump is . . . absolutely immune from prosecution for" any "conduct involving his discussions with Justice Department officials." *Ante,* at 21. That conception of core immunity expands the "conclusive and preclusive" category beyond recognition, foreclosing the possibility of prosecution for broad swaths of conduct. Under that view of core powers, even fabricating evidence and insisting the Department use it in a criminal case could be covered. The majority's conception of "core" immunity sweeps far more broadly than its logic, borrowed from *Youngstown*, should allow.

The majority tries to assuage any concerns about its made-up core immunity by suggesting that the Government

agrees with it. See *ante,* at 34. That suggestion will surprise the Government. To say, as the Government did, that a "small core of exclusive official acts" such as "the pardon power, the power to recognize foreign nations, the power to veto legislation, [and] the power to make appointments" cannot be regulated by Congress, see Tr. of Oral Arg. 85–87, does not suggest that the Government agrees with immunizing any and all conduct conceivably related to the majority's broad array of supposedly "core" powers. The Government in fact advised this Court to "leav[e] potentially more difficult questions" about the scope of any immunity "that might arise on different facts for decision if they are ever presented." Brief for United States 45. That would have made sense. The indictment here does not pose any threat of impermissibly criminalizing acts within the President's "conclusive and preclusive" authority. Perhaps for this reason, even Trump discouraged consideration of "a narrower scope of immunity," claiming that such an immunity "would be nearly impossible to fashion, and would certainly involve impractical line-drawing problems in every application." Brief for Petitioner 43–44.

When forced to wade into thorny separation-of-powers disputes, this Court's usual practice is to "confine the opinion only to the very questions necessary to decision of the case." *Dames & Moore* v. *Regan*, 453 U. S. 654, 661 (1981). There is plenty of peril and little value in crafting a core immunity doctrine that Trump did not seek and that rightly has no application to this case.

VI

Not content simply to invent an expansive criminal immunity for former Presidents, the majority goes a dramatic and unprecedented step further. It says that acts for which the President is immune must be redacted from the narrative of even wholly private crimes committed while in office. They must play no role in proceedings regarding private

criminal acts. See *ante,* at 30–32.

Even though the majority's immunity analysis purports to leave unofficial acts open to prosecution, its draconian approach to official-acts evidence deprives these prosecutions of any teeth. If the former President cannot be held criminally liable for his official acts, those acts should still be admissible to prove knowledge or intent in criminal prosecutions of unofficial acts. For instance, the majority struggles with classifying whether a President's speech is in his capacity as President (official act) or as a candidate (unofficial act). Imagine a President states in an official speech that he intends to stop a political rival from passing legislation that he opposes, no matter what it takes to do so (official act). He then hires a private hitman to murder that political rival (unofficial act). Under the majority's rule, the murder indictment could include no allegation of the President's public admission of premeditated intent to support the *mens rea* of murder. That is a strange result, to say the least.[5]

The majority's extraordinary rule has no basis in law. Consider the First Amendment context. Although the First Amendment prohibits criminalizing most speech, it "does not prohibit the evidentiary use of speech," including its use "to prove motive or intent." *Wisconsin* v. *Mitchell*, 508 U. S. 476, 489 (1993). Evidentiary rulings and limiting instructions can ensure that evidence concerning official acts is "considered only for the proper purpose for which it was admitted." *Huddleston* v. *United States*, 485 U. S. 681, 691–692 (1988). The majority has no coherent explanation as to

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[5] The majority suggests, in a footnote, that a "prosecutor may point to the public record to show the fact that the President performed the official act," so long as the prosecutor does not "invite the jury to inspect" the act in any way. *Ante,* at 32, n. 3. Whatever that suggestion is supposed to accomplish, it does not salvage the majority's nonsensical evidentiary rule.

why these protections that are sufficient in every other context would be insufficient here. It simply asserts that it would be "untenable" and would deprive immunity of its "'intended effect.'" *Ante,* at 31 (quoting *Fitzgerald*, 457 U. S., at 756). The majority hazards an explanation that the use of official-acts evidence will "raise a unique risk that the jurors' deliberations will be prejudiced by their views of the President's policies and performance while in office." *Ante,* at 31. That "unique risk," however, is not a product of introducing official-acts evidence. It is simply the risk involved in any suit against a former President, including the private-acts prosecutions the majority says it would allow.

VII

Today's decision to grant former Presidents immunity for their official acts is deeply wrong. As troubling as this criminal immunity doctrine is in theory, the majority's application of the doctrine to the indictment in this case is perhaps even more troubling. In the hands of the majority, this new official-acts immunity operates as a one-way ratchet.

First, the majority declares all of the conduct involving the Justice Department and the Vice President to be official conduct, see *ante,* at 19–24, yet it refuses to designate any course of conduct alleged in the indictment as private, despite concessions from Trump's counsel.[6] Trump's counsel conceded, for example, that the allegation that Trump

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[6]The majority protests that it is "adher[ing] to time-tested practices" by "deciding what is required to dispose of this case and remanding" to lower courts to sort out the details. *Ante,* at 41. Yet it implicitly acknowledges that it reaches far beyond what any lower court considered or any party briefed by designating certain conduct official in the first instance. See *ibid.* (noting "the lack of factual analysis in the lower courts, and the lack of briefing on how to categorize the conduct alleged"). In reaching out to shield some conduct as official while refusing to recognize any conduct as unofficial, the majority engages in judicial activism, not judicial restraint.

"turned to a private attorney who was willing to spread knowingly false claims of election fraud to spearhead his challenges to the election results" "sounds private." Tr. of Oral Arg. 29. He likewise conceded that the allegation that Trump "conspired with another private attorney who caused the filing in court of a verification signed by [Trump] that contained false allegations to support a challenge" "sounds private." *Ibid.*; see also *id.*, at 36–37 (Trump's counsel explaining that it is not "disputed" that such conduct is "unofficial"). Again, when asked about allegations that "[t]hree private actors . . . helped implement a plan to submit fraudulent slates of presidential electors to obstruct the certification proceeding, and [Trump] and a co-conspirator attorney directed that effort," Trump's counsel conceded the alleged conduct was "private." *Id.*, at 29–30. Only the majority thinks that organizing fraudulent slates of electors might qualify as an official act of the President, see *ante,* at 24–28, or at least an act so "interrelated" with other allegedly official acts that it might warrant protection, *ante,* at 28. If the majority's sweeping conception of "official acts" has any real limits, the majority is unwilling to reveal them in today's decision.

Second, the majority designates certain conduct immune while refusing to recognize anything as prosecutable. It shields large swaths of conduct involving the Justice Department with immunity, see *ante,* at 19–21; see also Part V, *supra*, but it does not give an inch in the other direction. The majority admits that the Vice President's responsibility "'presiding over the Senate'" is "'not an "executive branch" function,'" and it further admits that the President "plays no direct constitutional or statutory role" in the counting of electoral votes. *Ante,* at 23–24. Yet the majority refuses to conclude that Trump lacks immunity for his alleged attempts to "enlist the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." App. 187, Indictment

¶10(d). Instead, it worries that a prosecution for this conduct might make it harder for the President to use the Vice President "to advance [his] agenda in Congress." *Ante,* at 24. Such a prosecution, according to the majority, "may well hinder the President's ability to perform his constitutional functions." *Ibid.* Whether a prosecution for this conduct warrants immunity should have been an easy question, but the majority turns it into a debatable one. Remarkably, the majority goes further and declines to deny immunity even for the allegations that Trump organized fraudulent elector slates, pressured States to subvert the legitimate election results, and exploited violence at the Capitol to influence the certification proceedings. It is not conceivable that a prosecution for these alleged efforts to overturn a Presidential election, whether labeled official or unofficial under the majority's test, would pose any "'dangers of intrusion on the authority and functions of the Executive Branch,'" *ante,* at 14, and the majority could have said as much. Instead, it perseverates on a threshold question that should be immaterial.

Looking beyond the fate of this particular prosecution, the long-term consequences of today's decision are stark. The Court effectively creates a law-free zone around the President, upsetting the status quo that has existed since the Founding. This new official-acts immunity now "lies about like a loaded weapon" for any President that wishes to place his own interests, his own political survival, or his own financial gain, above the interests of the Nation. *Korematsu* v. *United States*, 323 U. S. 214, 246 (1944) (Jackson, J., dissenting). The President of the United States is the most powerful person in the country, and possibly the world. When he uses his official powers in any way, under the majority's reasoning, he now will be insulated from criminal prosecution. Orders the Navy's Seal Team 6 to assassinate a political rival? Immune. Organizes a military

coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune.

Let the President violate the law, let him exploit the trappings of his office for personal gain, let him use his official power for evil ends. Because if he knew that he may one day face liability for breaking the law, he might not be as bold and fearless as we would like him to be. That is the majority's message today.

Even if these nightmare scenarios never play out, and I pray they never do, the damage has been done. The relationship between the President and the people he serves has shifted irrevocably. In every use of official power, the President is now a king above the law.

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The majority's single-minded fixation on the President's need for boldness and dispatch ignores the countervailing need for accountability and restraint. The Framers were not so single-minded. In the Federalist Papers, after "endeavor[ing] to show" that the Executive designed by the Constitution "combines . . . all the requisites to energy," Alexander Hamilton asked a separate, equally important question: "Does it also combine the requisites to safety, in a republican sense, a due dependence on the people, a due responsibility?" The Federalist No. 77, p. 507 (J. Harvard Library ed. 2009). The answer then was yes, based in part upon the President's vulnerability to "prosecution in the common course of law." *Ibid.* The answer after today is no.

Never in the history of our Republic has a President had reason to believe that he would be immune from criminal prosecution if he used the trappings of his office to violate the criminal law. Moving forward, however, all former Presidents will be cloaked in such immunity. If the occupant of that office misuses official power for personal gain, the criminal law that the rest of us must abide will not provide a backstop.

With fear for our democracy, I dissent.