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

BRIEF OF PROFESSOR MARTIN S. LEDERMAN AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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Interest of Amicus[1]

Amicus is Professor from Practice at the Georgetown University Law Center and Senior Fellow of the GULC Supreme Court Institute. He has for many years taught and written on constitutional law, including on presidential authority. Amicus served as Deputy Assistant Attorney General in the Department of Justice Office of Legal Counsel from 2009 to 2010 and from 2021 to 2023, and as Attorney Advisor in OLC from 1994 to 2002.

Introduction

In Part II of his brief, Petitioner asks the Court to decide questions fundamentally different from the immunity issue the Court has formulated as the Question Presented—namely, (i) whether the statutes Petitioner is alleged to have violated govern a President's official conduct at all, wholly apart from criminal prosecution, and (ii) if so, whether they are constitutional as applied to such conduct. The principal objective of this amicus brief is to explain that the charged statutes do govern official-capacity presidential conduct and that, at least as applied to the discrete portion of the indictment against Petitioner that describes such official-capacity conduct, those statutes do not raise any serious constitutional concerns.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus made a monetary contribution to its preparation or submission.

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The Question Presented is "[w]hether and if so to what extent … a former President enjoy[s] presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office." Ordinarily, questions of immunity do not concern whether the substantive laws at issue bind the defendant; instead, the inquiry is whether a manner of *enforcing* those statutes—such as a damages action in a particular forum—is available. Adjudication of immunity therefore typically proceeds upon the assumption the defendant has violated a valid law.

For example, when this Court decides that a state enjoys sovereign immunity from private suits to enforce federal law in a particular forum, that does not mean the state is free to disregard the underlying law or that the United States itself may not sue the state in federal court, even for damages—to the contrary. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 755–56 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.14 (1996). Similarly, when a court determines that a law enforcement officer is entitled to qualified immunity from a damages action for violation of federal law, the court assumes (or in some cases decides) that the officer has violated the law, whether or not that legal conclusion was clearly established; qualified immunity therefore does not preclude enforcement of the law via injunction or a criminal proceeding. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 242–43 (2009); *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

Likewise, in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the Court held that former President Nixon

was immune from a private damages suit for allegedly approving the Air Force's discharge of the plaintiff in retaliation for his testimony to Congress. Such immunity, the Court explained, "will not place the President 'above the law'" because it "merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends." *Id.* at 758. The Court thus assumed—and Nixon did not argue otherwise—that the defendant might have violated federal statutes, including a criminal prohibition (18 U.S.C. § 1505), if Fitzgerald's allegations were sound. *Id.* at 756.

So, too, the immunity question the Court has formulated here is whether the Constitution precludes the executive branch itself from prosecuting a former President for acting in his official capacity to violate presumptively valid statutory constraints.

Petitioner, however, has interposed a new and very different question in Part II of his brief: He argues there that the pertinent statutory prohibitions do not or cannot limit a President's official-capacity conduct in the first instance, wholly apart from any question of criminal prosecution.[2]

* * * *

[2] Petitioner cites D. Ct. Doc. 114 (*see* Pet. Br. 37) to suggest he raised these arguments below. He did not. Although he made several other statutory arguments in that motion in the district court, neither there nor elsewhere has Petitioner previously argued that the charged statutes don't or can't regulate official-capacity presidential conduct. Amicus takes no view on whether this Court can and should adjudicate such a previously unraised argument at this juncture.

Both the Question Presented and Petitioner's new statutory arguments are limited to any alleged conduct Petitioner performed in his official capacity as President. *See Clinton v. Jones*, 520 U.S. 681, 694 (1997) (the Court has never "suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity"). Petitioner asserts (Pet. Br. 4) that virtually all of his alleged acts involved such official-capacity conduct. That is not so.

As amicus has elaborated elsewhere,[3] Petitioner engaged in most of the alleged conduct in his personal capacity, as part of an alleged conspiracy with private parties (including Petitioner's retained counsel) to induce state and federal officials to take steps that would lead to an official certification of Petitioner as President-elect despite the conspirators' knowledge that he did not, in fact, win the 2020 election. It is difficult to imagine how entering into such an agreement with non-governmental actors to achieve that impermissible objective, and the mine run of the Petitioner's alleged overt acts taken to achieve that conspiratorial end, could possibly be deemed official presidential conduct.

At least one discrete part of the indictment, however, does describe actions Petitioner undertook in his capacity as President—namely, his attempt "to use the Justice Department to make knowingly false claims of election fraud to officials in the targeted

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[3] Marty Lederman, *The Insignificance of Trump's "Immunity From Prosecution" Argument*, Lawfare, Feb. 27, 2024, https://www.lawfaremedia.org/article/the-insignificance-of-trump-s-immunity-from-prosecution-argument.

states through a formal letter under the Acting Attorney General's signature." J.A. 215 (Indictment ¶ 70). In particular, on December 27, 2020, Petitioner proffered multiple false claims of election fraud to Acting Attorney General Jeffrey Rosen and Acting Deputy Attorney General Richard Donahue—assertions the Department of Justice (DOJ) leaders unequivocally had refuted repeatedly. *Id.* at 216 (¶ 74). According to the indictment, when the Acting Attorney General informed the President once more that the Justice Department could not and would not change the outcome of the election, the Defendant responded: "Just say that the election was corrupt and leave the rest to me and the Republican congressmen.'" *Id.* Four days later, Petitioner again raised with DOJ leaders "claims about election fraud that Justice Department officials already had told him were not true—and that the senior Justice Department officials reiterated were false," and insinuated that if they did not do his bidding by attesting to such sham allegations, he might remove them and appoint a more receptive official as Acting Attorney General. J.A. 217-18 (¶ 77-78).

Such an effort was analogous to President Nixon's alleged efforts to have the Air Force discharge Ernest Fitzgerald, which this Court considered to be action "taken in the former President's official capacity during his tenure in office," 457 U.S. at 733, *see also id.* at 756–57, even if it was unlawful. *See also infra* at 23-24 (describing President Nixon's conspiracy to have the CIA make false claims to the FBI in order to derail the FBI's Watergate investigation).

To be sure, if Petitioner tried to induce DOJ officials to convey false accusations of election fraud in

order to pave the way for Petitioner to be wrongly declared the President-elect, that conduct would have been unlawful—indeed, a breach of his "take Care" duty. Nevertheless, and in contrast to most of the conduct alleged in the indictment, it clearly consisted of a President engaging in "official acts" for purposes of a *Fitzgerald*-like immunity analysis.

Accordingly, the indictment's DOJ-specific allegations ought to be the focus of any assessment of whether the charged statutes applied to Petitioner's official presidential conduct and, if so, whether the Constitution prohibits the executive branch from using criminal process to enforce such valid laws against a former President.[4]

Summary of Argument

I. The Constitution does not immunize a former President from criminal trial or penalty for violating an otherwise valid federal criminal statute, even when the alleged offenses involved official-capacity acts. In contrast to *Fitzgerald*, where neither political branch had determined that a suit was proper, conferral of immunity from federal prosecution would contravene the joint judgment of both political branches. Nothing in the Constitution requires repudiation of that joint assessment by cloaking the President with a unique

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[4] *See also* J.A. 202 (Indictment ¶ 31-f) (alleging that on January 2, 2021, Petitioner said to the Georgia Secretary of State that the Secretary might be subject to criminal prosecution if he failed to "find" sufficient election fraud to secure the award of the State's electoral votes to Petitioner—a threat that Petitioner might be understood to have made in his official capacity as President).

form of immunity. Moreover, deeply rooted Department of Justice norms are a formidable check on the possibility DOJ might cavalierly initiate prosecutions that could seriously compromise Presidents' proper exercise of their constitutional functions.

II. Each of the statutes charged here proscribes inherently wrongful conduct and therefore they apply to *all* persons who violate their substantive terms, including U.S. Government officials. Congress did not implicitly exempt presidential conduct from those otherwise comprehensive *malum in se* prohibitions.

A. There is no canon of statutory construction that a generally applicable law does not apply to a President's official actions absent a clear statement to that effect. No holding of the Court supports it, and such a rule would be inconsistent with decisions of this Court and Chief Justice Marshall's landmark decision in Aaron Burr's treason prosecution. Congress has specifically exempted presidential (or presidentially directed) conduct from such laws where appropriate. Moreover, such a rule of construction would have an alarming, unintended impact on many statutory limitations that Congress surely anticipated would constrain abuses of office by all U.S. Government officials, including the President.

B. The canon of constitutional avoidance is inapplicable here, where there is no textual ambiguity and where few if any applications of the statutes to official presidential acts would raise serious constitutional concerns.

III. Even if one could conjure hypothetical cases where application of the charged statutes to a former

President would raise a serious constitutional question, this prosecution does not do so. The discrete part of the indictment involving official presidential conduct describes efforts to induce other Government officials to violate the law in order to cause still other officials to miscount presidential electoral votes and issue an invalid designation of the President-elect, even though Petitioner allegedly knew he was not duly elected. Congress surely can prohibit such an abuse of presidential authority.

Argument

I. The Constitution does not immunize a former President from criminal trial or penalty for abusing his official authority in violation of federal statutes that validly prohibit such abuse of office.

Because the Government and other amici presumably will address the Question Presented thoroughly, amicus confines his discussion of immunity to a pair of salient points the court of appeals did not emphasize.

First, in sharp contrast with *Nixon v. Fitzgerald*, conferring immunity in a case such as this would contravene the judgments of both political branches.

In *Fitzgerald*, it was unclear whether Congress had authorized a civil remedy for violation of the applicable statutes at all, *see* 457 U.S. at 740 n.20 (identifying but not deciding that question), let alone against a former President. *See also id.* at 748 n.27 (expressly reserving the question of whether Congress could constitutionally authorize private damage

actions for official-but-unlawful presidential conduct). Here, by contrast, the immunity question arises with respect to enforcement of statutory provisions that *do* (and constitutionally may) prescribe criminal penalties for inherently wrongful conduct that takes the form of an abuse of presidential authority. *See infra* Parts II-III.

Moreover, in *Fitzgerald* the executive branch concluded that the damages action was inappropriate—indeed, unconstitutional—because of the potentially baneful impact of such suits on presidential decision-making.[5] In this case, by contrast, DOJ has determined that it can prove beyond a reasonable doubt that a former President misused his authority to induce other Government officials to themselves violate the law in order to achieve an electoral outcome the President himself knew would be invalid, and that prosecuting the former President for such an extraordinary abuse of office will not unduly chill future Presidents' proper performance of their constitutional duties.

There is nothing in constitutional text, history or caselaw that requires a repudiation of that joint political-branch assessment by cloaking the President with a unique form of immunity.

Second, there is no prospect of inappropriate interbranch influence where the Executive itself prosecutes a former President. And, as countless current and former DOJ officials can attest, deeply

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[5] *See* Memorandum for the United States as Amicus Curiae, *Nixon v. Fitzgerald*, Nos. 79-1738, 80-945 (Nov. 19, 1981) (endorsing the arguments in the Government's submission in *Kissinger v. Halperin*, No. 79-880 (June 22, 1981)).

ingrained institutional norms provide a formidable check on the prospect of prosecutions that might seriously compromise the proper exercise of the President's constitutional functions. *See* Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 Duke L.J. 1183, 1199–1202 and cases cited in note 94 (2012) (DOJ's "strong tradition of defending acts of Congress" does not extend to statutes "'that encroach upon the constitutional powers of the Presidency'—a position that has been followed consistently by presidential administrations") (citation omitted); *see also The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 126 (1996) ("Executive branch lawyers … have a constitutional obligation, one grounded not in parochial institutional interests but in our fundamental duty to safeguard the liberty of the people, to assert and maintain the legitimate powers and privileges of the President against inadvertent or intentional congressional intrusion.").

II. The charged criminal statutes apply to a President's abuse of official authority.

In Part II of his brief, Petitioner argues that, wholly apart from the question of the constitutionality of criminal prosecution, the statutory prohibitions charged in the indictment simply do not apply to constrain "the President or his official acts" at all. Pet. Br. 37.

That is not correct. Each of the charged statutes proscribes inherently wrongful conduct, and therefore they all employ broad, general terms such as "whoever" or "persons" to indicate their application to

all persons who violate their terms, without exception. Accordingly, those statutes prohibit government actors, including *federal* officials and employees, from abusing their governmental authorities (i) as part of a conspiracy to "defraud the United States," 18 U.S.C. § 371; (ii) in a conspiracy or attempt to "corruptly obstruct[], influence[], or impede[] any official proceeding," *id.* §§ 1512(c)(2) & (k); or (iii) as part of a conspiracy designed to "injure" individuals' constitutional rights, *id.* § 241. *See Nardone v. United States*, 302 U.S. 379, 384 (1937) (because of the "well recognized principle" "that the sovereign is embraced by general words of a statute intended to prevent injury and wrong," it was proper to apply a criminal wiretapping statute "as it is written so as to include within its sweep federal officers, as well as others").

Petitioner does not dispute that the laws prohibit other federal actors from abusing their authority. Yet he argues that they must be construed to contain an implied exception for the President alone. If that were so, then every President would be free—at least insofar as federal statutes are concerned—to conspire to use the formidable powers of the office to defraud the United States, including with respect to its determination of who is lawfully entitled to be President; to attempt to corruptly obstruct, influence and impede official proceedings—indeed, to alter, destroy or conceal documents in order to deny their use in an official proceeding, *see* 18 U.S.C. § 1512(c)(1); and to conspire to deny individuals' constitutional rights.

There is no basis for imputing to Congress such a deeply counterintuitive design. To the contrary, there's every reason to assume Congress would have

concluded that "policy reasons for prohibiting such abuses of power by the President as much as by any other Government official are clearly present" and therefore "that the President does, indeed, fall within the terms" of a statute prohibiting such conduct. *The President—Interpretation of 18 U.S.C. § 603 as Applicable to Activities in the White House*, 3 Op. O.L.C. 31, 38 (1979) (concluding that the President was subject to a statute providing felony sanctions for "[w]hoever" solicits or receives "any contribution of money or other thing of value for any political purpose" in specified federal buildings, *id.* at 32 (quoting what was then 18 U.S.C. § 603 (1979)).[6]

A. There is no canon of construction that precludes application of a generally applicable statute to a President's official conduct absent a clear statement.

Petitioner's principal argument to the contrary is that *any* generally applicable statute must be construed not to apply "to the President or his official acts" absent a clear statement to the contrary. Pet. Br. 37, 40. Yet there is no such canon of statutory construction, as landmark cases involving the

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[6] In light of that OLC opinion, Attorney General Bell investigated whether President Carter had violated the statute at a 1978 White House luncheon (which would have triggered appointment of a special prosecutor). *See id.* at 48–54 (appending the AG's report to the D.C. Circuit Special Prosecutor Division). Bell concluded the matter was "so unsubstantiated that no further investigation or prosecution is warranted, and that no special prosecutor should be appointed." *Id.* at 54.

application of general statutes to official-capacity presidential conduct demonstrate.

In preparation for his trial for treason in 1807, Aaron Burr asked Chief Justice Marshall, who was presiding as Circuit Justice, to issue a subpoena *duces tecum* to President Jefferson to appear in court with official correspondence from the Governor of the Louisiana Territory and other documents. *See Trump v. Vance*, 591 U.S. 786, 140 S. Ct. 2412, 2421–24 (2020) (recounting the Burr prosecution and the Jefferson subpoena). Marshall recognized that a generally applicable federal statute then in effect directed the court to issue such a subpoena when requested by "every … such person or persons accused or indicted of [treason or another capital offense]." *United States v. Burr*, 25 F. Cas. 30, 33 (No. 14,692d) (C.C. Va. 1807); *see also id.* at 34–35 (construing the provision to require a witness not only to appear but also to bring any paper "of which the party praying it has a right to avail himself as testimony").

Marshall proceeded to examine in detail whether the statute (and the parallel constitutional requirement) applied to the President. The law itself, he noted, contained "no exception whatever." *Burr*, 35 F. Cas. at 34. "The obligation, therefore, of those provisions is general; and it would seem that no person could claim an exemption from them, but one who would not be a witness." *Id.* Marshall nevertheless considered the possibility that if the common law of evidence recognized an exception, perhaps such an exception could likewise be implied in the statute. Yet the "single reservation alluded to" in the British law of evidence was "the case of the king": It was "said to be incompatible with his dignity to appear under the

process of the court." *Id.* Marshall held, however, that the common-law exception for the British monarch did not carry over to the American chief executive. He explained that "the principle of the English constitution that the king can do no wrong, that no blame can be imputed to him, that he cannot be named in debate" does not apply to the American President. Marshall therefore concluded that "the law does not discriminate between the president and a privat citizen," and that neither the statute nor the Sixth Amendment contained an implicit exemption for the President from compulsory process. *Id.* "If, in any court of the United States, it has ever been decided that a subpoena cannot issue to the president, that decision is unknown to this court." *Id.*

That holding in *Burr* belies the notion that a generally applicable law does not reach a President's official acts absent a clear statement. More recent decisions of this Court in two cases involving President Nixon's official-capacity conduct are similarly instructive.

In *United States v. Nixon*, 418 U.S. 683 (1974), the Court reviewed a subpoena Judge Sirica had issued to the President for tapes of Oval Office conversations with other Government officials, pursuant to a generally applicable statute that by its terms applies to any "person to whom [the subpoena] is directed." Fed. R. Crim. P. 17(c). Before turning to the executive privilege questions for which the *Nixon* decision is best known, the Court addressed several arguments that the subpoena did not comply with Rule 17(c). 418 U.S. at 697–702. Neither the Court nor Nixon suggested that Rule 17(c) might not apply to a subpoena for official presidential materials, even though that Rule

lacks any "clear statement" of presidential coverage. To be sure, citing the precedent of Chief Justice Marshall's decision in the *Burr* case and the "deference" owed "to a coordinate branch of Government," the Court cautioned that appellate review of a subpoena to a sitting President "should be particularly meticulous *to ensure that the standards of Rule 17(c) have been correctly applied*." *Id.* at 702 (emphasis added). Yet both the Court and Nixon apparently accepted that Rule 17 did, indeed, apply to the presidential subpoena, in accord with Chief Justice Marshall's holding in *Burr*.

Similarly, in *Nixon v. Fitzgerald*, the plaintiff alleged that by allegedly approving his dismissal from the Air Force to discharge him in retaliation for his congressional testimony, President Nixon had violated, inter alia, 18 U.S.C. § 1505, which made it a crime for "[w]hoever" to "corruptly … endeavor[] to influence, obstruct, or impede … the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by … any committee of either House." Notably, Nixon did not argue that he was exempt from the application of that statute when he superintended the Air Force, nor did any Justice of the Court call into question the criminal statute's application to the President, notwithstanding that it lacks any clear statement of presidential coverage. *See* 457 U.S. at 740 n.20 (reserving the question whether § 1505 created an implied cause of action).

Petitioner cites only one decision of this Court, *Franklin v. Massachusetts*, 505 U.S. 788 (1992), as purported authority for his proposed "clear statement" canon. Pet. Br. 37. *Franklin*, however, did not rely

upon or endorse any such categorical rule. In that case, the Court examined whether the Administrative Procedure Act's provisions for judicial review of whether an agency's exercise of discretion is "arbitrary and capricious," *see* 5 U.S.C. §§ 704, 706(2)(A), applied to President Bush's exercise of a statutory authority to declare the apportionment of seats in the House of Representatives in light of census results. After noting that the APA's text does not "explicitly" either include or exclude the President from the term "agency," 505 U.S. at 800, the Court held that "[a]lthough the President's actions may still be reviewed for constitutionality, … they are not reviewable for abuse of discretion under the APA," *id.* at 801 (citations omitted).

That holding was entirely unremarkable in light of the particular question about the President that the Court addressed in *Franklin*, which the plaintiff States did not even contest.[7] To begin with, the term "agency" "would be a peculiar way to refer to the President … since an 'agency' is generally understood as being responsible to a principal."[8] Furthermore, it would have been groundbreaking and alarming for Congress to have subjected the President's decision-

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[7] *See* Brief of the Appellees, *Franklin v. Massachusetts*, No. 91-1502, at 113 n.36 (1992) (declining to take issue with the Government's argument that the President isn't an "agency" under the APA "since no action or omission by the President or his staff has ever been called into question or otherwise put at issue in this litigation").

[8] Brief for the Appellants, *Franklin v. Massachusetts*, No. 91-1502, at 30 n.16 (1992).

making not only to judicial review for arbitrariness, but also, in many cases, to the requirement of notice-and-comment rulemaking and certain adjudicatory procedures. Not surprisingly, then, for many decades before *Franklin* Presidents had not considered themselves to be governed by the APA and therefore had not subjected their rulemaking to notice and comment, and Congress had not questioned that longstanding practice.[9]

In light of that context, it was hardly surprising that the Court in *Franklin* included the sentence upon which Petitioner would place so much weight: "We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties *to be reviewed for abuse of discretion*." 505 U.S. at 801 (emphasis added). By offering that APA-specific statement, the Court in no way suggested it was promulgating a general principle of construction applicable to all statutes—let alone insist that any "express statement" condition governs even those statutes, *unlike* the APA, that use comprehensive terms such as "whoever" or "no person" in order to categorically prohibit inherently wrongful activity.

Petitioner also relies upon a 1995 Office of Legal Counsel (OLC) opinion. *See* Pet. Br. 37–38 (citing

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[9] *See* Memorandum from Office of Legal Counsel, Re: *Application of the Freedom of Information Act to the President*, at 6–12 (Jan. 30, 1973), https://www.justice.gov/d9/pages/attachments/2022/09/02/la_19730130_application_of_the_freedom_of_information_act_to_the_president_0.pdf; *see also id.* at 2-6 (explaining that the legislative history of the APA also cast doubt on the idea that "agency" includes the President).

Application of 28 US.C. § 458 to Presidential Appointments of Federal Judges, 19 Op. O.L.C. 350 (1995)). The statute at issue there stated (using the passive voice) that no person could be "appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court." 28 U.S.C. § 458 (1995). OLC concluded that the law's text and history "conclusively established" its inapplicability to presidential appointments of federal judges. 19 Op. O.L.C. at 351; *see also id.* at 359–63. OLC added, however, that a "feature of the constitutional framework" dictated the same conclusion, invoking an allegedly "well-settled" principle "that statutes that do not expressly apply to the President must be construed as not applying to the President if such application would involve a possible conflict with the President's constitutional prerogatives." *Id.* at 351.

Even if taken at face value, that OLC statement does not help Petitioner because, as explained below, application of the criminal prohibitions here to the DOJ portions of the indictment would *not* "involve a possible conflict with the President's constitutional prerogatives." Moreover, OLC's articulated "principle" of construction was (and is) anything but "well-settled."

OLC relied principally upon three of this Court's decisions. The first was *Franklin*, *see id.* at 351, 352–353, but, as explained above (at 15-17), *Franklin* recognized no such broadly applicable rule. The second decision was *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989), which did not involve a question about whether the President was included

within a generally applicable rule. The Court in *Public Citizen* instead simply applied the constitutional avoidance canon to a particular statutory term ("utilized"), *id.* at 465–67, in order to confirm a construction of the Federal Advisory Committee Act the Court had already reached based upon the Act's history, context and purpose, *id.* at 452–65. In the third case, *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993), the Court merely held that statutory text regulating the Attorney General did not govern a presidential directive to the Coast Guard, *id.* at 171–72, and that the presumption against extraterritorial application "has special force" when the statute or treaty in question "may involve foreign and military affairs for which the President has unique responsibility," *id.* at 188.[10]

The 1995 OLC opinion also cited several earlier DOJ opinions, *see* 19 Op. O.L.C. at 355–57 & n.10, but those opinions merely purported to discern actual congressional intent,[11] to apply the established constitutional avoidance canon,[12] or to use other

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[10] In a footnote, 19 Op. O.L.C. at 355 n.9, OLC also cited three other cases that are not on point, including, oddly enough, *Nixon v. Fitzgerald* itself. In none of those cases did the Court decide whether the President was subject to a generally applicable statute, let alone announce a rule of construction to govern such questions.

[11] *E.g.*, *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 129–34 (1984)

[12] *E.g.*, Memorandum for Richard T. Burress, Office of the President, from Laurence H. Silberman, Deputy Attorney General, Re: *Conflict of Interest Problems Arising out of the*

familiar and relatively uncontroversial modes or precepts of statutory interpretation.[13]

After discussing these Supreme Court and DOJ opinions, the 1995 OLC opinion "summar[ized]" the purported principle of statutory construction in this way: "[A] statute that does not by its express terms apply to the President may not be applied to the President if doing so would raise a *serious* question under the separation of powers." 19 Op. O.L.C. at 357 (emphasis added); *accord The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 178 (1996) ("where applying a statute to the President would pose a *significant* question regarding the President's constitutional prerogatives") (emphasis added). That formulation—which articulates a more demanding trigger for a "clear statement" requirement than the

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President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution at 5 (Aug. 28, 1974) (using the avoidance canon to "buttress[]" "considerations of legislative history and statutory language"); *Removal of Members of the Advisory Council on Historic Preservation*, 6 Op. O.L.C. 180, 185 n.7 (1982).

[13] *E.g.*, *Judges—Appointment—Age Factor*, 3 Op. O.L.C. 388 (1979) (construing the language of the Age Discrimination in Employment Act not to apply to presidential appointments of judges); Memorandum for Egil Krogh, Staff Assistant to the Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Re: *Closing of Government Offices in Memory of Former President Eisenhower*, at 3 (Apr. 1, 1969), https://www.justice.gov/olc/page/file/935966/dl?inline (asserting that statutes referring to "officers" or "officials" of the United States "[g]enerally" are construed not to encompass the President absent a "specific" congressional indication).

"possible conflict with the President's constitutional prerogatives" version that appeared earlier in the opinion—is suggestive of the traditional constitutional avoidance canon, which, as discussed below, does not support Petitioner's proposed presidential exemption from the statutes in this case.

Significantly, none of the Supreme Court and DOJ opinions discussed in the 1995 OLC opinion involved statutes such as those at issue in this case, which employ broad terms of coverage such as "whoever" or "any person" to describe the comprehensive scope of a prohibition on inherently wrongful conduct. As discussed below, applying *those* sorts of restrictions to a President's official acts typically does not raise any constitutional concerns at all. And, importantly, the 1985 OLC opinion specifically clarified that "[t]he clear statement principle we have identified does not apply with respect to a statute that raises no separation of powers questions were it to be applied to the President." 19 Op. O.L.C. at 357 n.11. Thus, even taken on its own terms, that OLC opinion does not support Petitioner's unqualified assertion (Pet. Br. 37) that Congress "must speak clearly" in order to apply *any* statute of general applicability "against the President or his official acts."[14]

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[14] In some (relatively unusual) cases, courts and OLC have construed a statute to incorporate background principles that exclude application of the law to particular sorts of governmental activities. For example, it may be appropriate to construe a statute to impliedly exclude authorized conduct of public officers where such an application "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."

Moreover, Congress has demonstrated that when it wishes to exempt the President, or certain presidentially approved actions, from a broadly applicable prohibitory statute, it knows how to do so. *See, e.g.*, 18 U.S.C. § 2511(3) (1968), enacted by Pub. L. 90-351, § 802, 82 Stat. 197, 214 (1968) (specifying particular exercises of the President's constitutional authorities that would not be subject to two different sets of statutory limitations and conditions on wiretapping and other interceptions of communications)[15]; 50 U.S.C. § 1811

Nardone, 302 U.S. at 384; *see also, e.g.*, *Visa Fraud Investigation*, 8 Op. O.L.C. 284, 287 (1984) (statute prohibiting issuance of visa to someone known to be ineligible did not prohibit State Department from issuing such a visa where "necessary" to facilitate important an undercover operation carried out in a "reasonable" fashion); *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148, 164 (1994) (statute prohibiting the willful destruction of a civil aircraft, which otherwise applies to U.S. government conduct, should not be construed to have "the surprising and almost certainly unintended effect of criminalizing actions by military personnel that are lawful under international law and the laws of armed conflict").

Background principles such as these ordinarily are not President-specific; instead, they apply to all government actors whose actions come within the terms of the implied exception. Petitioner has not cited any such principle that might apply to the DOJ portions of the indictment here, and amicus is not aware of any that might be germane in this case.

[15] *See United States v. U.S. Dist. Ct. for the E. Dist. of Mich.*, 407 U.S. 297, 303–04 (1972) (explaining that the 1968 legislation "broadly prohibit[ed] the use of electronic surveillance 'except as otherwise specifically provided in this chapter,'" and that § 2511(3), in particular, carved out certain exercises of the President's constitutional authority that would not be covered).

("Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress."); 5 U.S.C. § 7322(1) (exempting the President and the Vice President from the term "employee" in the Hatch Act); 18 U.S.C. § 202(c) (excluding the President, the Vice President, members of Congress and federal judges from the terms "officer" and "employee" for purposes of six specified criminal statutes).

Finally, it is important to appreciate the dramatic impact Petitioner's proposed "clear statement" rule would have with respect to many other federal statutes that broadly prohibit conduct "intended to prevent injury and wrong." *Nardone*, 302 U.S. at 384.

For starters, the indictment's DOJ-related allegations are uncannily reminiscent of President Nixon's plot with his Chief of Staff H.R. Haldeman, captured on the infamous "smoking gun" recording of June 23, 1973, to implore the CIA Deputy Director to make false claims to the FBI in order to derail its

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In the Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, 92 Stat. 1783 (1978), Congress repealed that presidential-authorities proviso, *id.* § 201(c), 92 Stat. 1797, and replaced it with a provision stating that the procedures in FISA and related statutes "shall be the exclusive means by which electronic surveillance … and the interception of domestic wire and oral communications may be conducted." *Id.* § 201(b), 92 Stat. 1797 (codified as 18 U.S.C. § 2511(2)(f) and 50 U.S.C. § 1809(a)). At the same time, Congress enacted a different war-specific presidential exception, *id.* § 111, 92 Stat. 1796, which is codified as 50 U.S.C. § 1811, quoted in the text above.

Watergate investigation. *See United States v. Haldeman*, 559 F.2d 31, 54 n.15 (D.C. Cir. 1976). That scheme was part of the basis for Haldeman's conviction under 18 U.S.C. § 371—an offense charged against Petitioner here, too—for conspiracy to defraud the United States of its right to have its agencies transact their business free from corruption, undue influence or obstruction. *See* 559 F.2d at 31, 120-21. Although President Nixon's involvement in the conspiracy with Haldeman was likewise unlawful, it, too, involved acts taken pursuant to the President's official authority to direct subordinates' conduct. If Petitioner were correct that official-capacity presidential conduct is exempt from § 371, then Nixon himself would have been statutorily unconstrained to direct Haldeman, and the CIA, to defraud the United States.[16]

On Petitioner's view, a President would not be prohibited by statute from perjuring himself under oath about official matters; from corruptly altering, destroying or concealing documents to prevent them from being used in an official proceeding; from suborning others to commit perjury; from bribing witnesses or public officials; or from threatening witnesses.[17] A President—and only a President—could poll members of the armed forces about their

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[16] Even before the disclosure of the tape of Nixon's June 23 meeting with Haldeman, the Watergate grand jury had determined there was probable cause to believe Nixon was a member of the charged conspiracy to defraud the United States. *See United States v. Nixon*, 417 U.S. 960 (1974) (mem.).

[17] *See, e.g.*, 18 U.S.C. §§ 201 (bribery), 1512(b) (threatening witnesses), 1512(c)(1) (destroying or concealing documents for proceedings), 1621 (perjury), 1622 (suborning perjury).

confidential electoral votes, notwithstanding 18 U.S.C. § 596, and could attempt to intimidate, threaten, command, or coerce other federal employees to vote (or not to vote) for particular candidates or to engage in (or refrain from) other political activities, including making campaign contributions, notwithstanding 18 U.S.C. § 610. A President also would be unconstrained by statute from committing war crimes, genocide, or torture; from stockpiling or selling biological weapons; from using child soldiers; or from "command[ing]" others, 18 U.S.C. § 2(a), who concededly *are* subject to such laws, to violate them.[18] And the treason statute, 18 U.S.C. § 2381, too, would not apply to a President.

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[18] *See* 18 U.S.C. §§ 175 (biological weapons), 1091 (genocide), 2340 and 2340A (torture), 2441 (war crimes), 2442 (recruitment or use of child soldiers).

OLC's treatment of the torture statute is particularly revealing for present purposes. When the Office notoriously concluded that Congress lacked constitutional authority to prohibit torture approved by the Commander in Chief, it also applied the constitutional avoidance canon to conclude that the statute didn't cover such cases. *See* Memorandum for Alberto Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A*, at 33–35 (Aug. 1, 2002), https://www.justice.gov/olc/file/886061/dl?inline. When OLC withdrew that 2002 opinion later in the George W. Bush Administration and then reversed its view about Congress's constitutional authority, it concluded that the torture statute "does apply as a general matter to the subject of detention and interrogation of detainees conducted pursuant to the President's Commander in Chief authority." Memorandum to the Files from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Re: *Status of Certain OLC Opinions in the Aftermath*

All of those statutes, like those charged here, use general terms such as "whoever" or "any person" to ensure their comprehensive coverage. Yet none of them includes a "clear statement" that the President is in the class of covered persons. That very common omission cannot be of any legal significance. There is no imaginable reason Congress would have wished to exclude the President from the application of such laws, even—or especially—when the President does so by misusing his Article II authority to supervise the executive branch.

B. The canon of constitutional avoidance does not apply here.

Petitioner alternatively suggests that the Court should construe the statutes at issue to exempt application to a President's official acts in order to avoid a serious constitutional question. Pet. Br. 38. The constitutional avoidance canon, however, is inapposite here for two reasons.

First, that canon "has no application in the absence of statutory ambiguity," *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001), and there is nothing ambiguous about whether the textual terms of the statutes here (e.g., "whoever";

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of the Terrorist Attacks of September 11, 2001, at 3 (Jan. 15, 2009), https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memostatusolcopinions01152009.pdf (quoting from Bradbury's earlier Reponses to Questions from the Record in 2005). OLC did not suggest that Congress's failure to include a clear statement referring to the chief executive meant that the statute excludes the President from its coverage.

"persons") apply to the President just as they apply to other U.S. Government actors. Indeed, Petitioner concedes that they apply to the President's personal-capacity conduct and he does not contest that they apply to other officers' abuse of office; his argument is that the Court should somehow construe the statutes to exclude application only to the President's official conduct. But "there is no plausible construction of the text" that could bear such a reading. *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 581 (2022).

Second, even if the statutes were susceptible to a reading that excluded official presidential conduct, it is appropriate to apply the avoidance canon only to avoid a construction that "would raise serious constitutional problems." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). The ordinary application of these statutes to prohibit a President's abuse of office by committing the sorts of *malum in se* offenses that they describe, however, does not raise any serious constitutional problems. Indeed, even if there were no such statutes, the President lacks constitutional authority to conspire to defraud the United States, to "corruptly" obstruct, influence, or impede official proceedings, or to conspire to violate constitutional rights—let alone to do so by trying to direct other Government officials to unlawfully exercise their own authorities. *See* Art. II, § 3 ("[the President] shall take Care that the Laws be faithfully executed").

III. The charged statutory offenses do not raise any significant constitutional questions as applied to the official-capacity allegations here.

Finally, Petitioner suggests that application of some or all of the charged statutes might "be deeply constitutionally questionable" as applied to a President's official actions that "fall[] squarely within his [constitutional] duties." Pet. Br. 39-40. He invokes the prospect of prosecutions based upon the President's "selection of Cabinet-level officers," "direction of the Department of Justice," or "public statements by a President on matters of enormous public concern." *Id.* at 40.

The indictment's allegations of official-capacity conduct in this case, however, do not raise any questions about whether and under what circumstances the statutes could be construed, and constitutionally applied, to penalize a legitimate exercise of a President's constitutional functions. Nor do those allegations tee up any questions of whether there are some presidential functions (e.g., the power to veto and sign legislation; the pardon power; the power to appoint principal officers subject to the Senate's advice and consent) that Congress may not constrain at all, even in circumstances where a President exercises such authorities unconstitutionally (such as in exchange for a bribe; in a manner designed to violate limitations found in, e.g., the First Amendment or Article VI's Religious Test Clause; or in order to undermine the executive

branch's faithful execution of the law).[19] The indictment's allegations of official-capacity conduct do not raise any such issues—nor do they even implicate prosecution on the basis of ordinary presidential "advocacy to Congress" or "public statements by a President" in his *official* capacity "on matters of enormous public concern." Pet. Br. 40.

Petitioner is correct, however, that the indictment *does* allege, at least in small part, violations of the statutes based upon "his direction of the Department of Justice." Pet. Br. 40. Indeed, as explained *supra* at 4-5, those are the only parts of the indictment that plainly implicate any question of official presidential conduct. But a prosecution based upon Petitioner's attempted "direction" of the top DOJ officials does not come anywhere close to a situation that implicates a serious constitutional question, for two reasons.

First, the discrete, relevant portions of the indictment allege an effort by Petitioner to induce DOJ officials to announce allegations of election fraud that

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[19] The Court has stated in unqualified dicta, for example, that the power to veto legislation "cannot be narrowed or cut down by Congress," *The Pocket Veto Case*, 279 U.S. 655, 677-78 (1929), and that the pardon power "is not subject to legislation," *United States v. Klein*, 80 U.S. (13 Wall.) 128, 141 (1872). Amicus respectfully suggests that the Court should not address such novel and difficult questions unless and until they are presented in the context of a concrete application of a statute to prosecute a former President for, e.g., vetoing or signing legislation, issuing a pardon, or appointing or removing a principal officer—something DOJ is unlikely to even contemplate absent truly extraordinary, unforeseeable circumstances.

those officials repeatedly informed the President were groundless. *See, e.g.*, J.A. 189 Indictment ¶ 11-b). There is no dispute that had those officials complied with the President's directive, they would have acted unlawfully and abused their own authority. The Constitution does not empower the President to direct other executive branch officials to knowingly violate the law in that way. *See Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838); *see also United States v. Smith*, 27 F. Cas. 1192, 1230 (No. 16,342) (C.C.D.N.Y. 1806) (Patterson, J., presiding) ("The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids.").

Second, the alleged *objective* of the former President's attempt to exploit DOJ was something that would itself have been unlawful—namely, the counting of illegitimate electoral votes and the false certification of Petitioner as President-elect. (This indictment therefore is unlike a hypothetical case in which the Government prosecutes a former President for making factually dubious factual claims in an effort to persuade other Government actors to make what would otherwise have been a perfectly legitimate policy choice—an unlikely scenario that might raise constitutional questions not present here.) If the allegations in the indictment are true, Petitioner and his co-conspirators endeavored to have other Government actors (i.e., the President of the Senate and the two Houses of Congress sitting in Joint Session on January 6, 2021) formally determine that Petitioner himself had received more than 269

electoral votes and to declare that Petitioner therefore "shall be the President," Amend. XII, even though Petitioner *knew* such a declaration would be improper and unlawful. *See, e.g.*, J.A. 187, 188, 190 (Indictment ¶¶ 10-d, 11, 12).

At least where, as here, the allegations of official-capacity misconduct partake of *both* of these characteristics, there is nothing constitutionally problematic about efforts to enforce the charged statutes, once the President leaves office, to punish and deter such an abuse of the President's authority. In the unlikely event DOJ were ever to employ these statutes in a manner that raises a more serious as-applied constitutional question, this Court can at that point apply a "particularly meticulous" review, as it did in *Nixon*, 418 U.S. at 702, to ensure that the prosecution does not transgress any potential constitutional limits. But "there is no serious doubt about the constitutionality of [the statutes] as applied to the facts of this case." *Salinas v. United States*, 522 U.S. 52, 60 (1997).

Conclusion

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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