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 RETIRED FOUR-STAR ADMIRALS AND GENERALS, AND FORMER SECRETARIES OF THE U.S. ARMY, NAVY, AND AIR FORCE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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April 8, 2024

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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STATEMENT OF INTEREST[1]

Amici are retired four-star admirals and generals, and former secretaries of the Army, Navy, and Air Force. They served under each President from John F. Kennedy to Donald J. Trump.

Amici are deeply interested in this case because presidential immunity from criminal prosecution would threaten the military's role in American society, our nation's constitutional order, and our national security. It also would have profoundly negative effects on military service members, who answer to the orders of the President as Commander-in-Chief. This submission is based on *amici*'s collective experience serving in and leading our military, as well as their collective interest in safeguarding our national security. *Amici*'s short biographies listed below only begin to describe their distinguished service to our country.

Admiral Steve Abbot, United States Navy (Retired), graduated from the U.S. Naval Academy in 1966, deployed to Vietnam, and began a career of 34 years with the U.S. Navy. His final active-duty tour was as Deputy Commander-in-Chief, U.S. European Command from 1998 to 2000. Following his retirement, Admiral Abbot served as Deputy Homeland Security Advisor to President George W. Bush from 2001 to 2003.

Admiral Thad Allen, United States Coast Guard (Retired), retired in 2010 as the 23rd Commandant of the U.S. Coast Guard. Admiral Allen led the federal responses to Hurricanes Katrina and Rita and the

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

Deepwater Horizon oil spill. He led Atlantic Coast Guard forces in response to the 9/11 attacks and coordinated the Coast Guard response to the Haitian Earthquake of 2010.

Former Secretary of the Army Louis Caldera graduated from the U.S. Military Academy at West Point and served in the Army on active duty from 1978 to 1983. He served in two Senate-confirmed positions in the Clinton Administration, including as Secretary of the Army, and in the Obama White House as an Assistant to the President and Director of the White House Military Office.

General George Casey, United States Army (Retired), enjoyed a 41-year career in the U.S. Army. He is an accomplished soldier and an authority on strategic leadership. During his tenure as the Army Chief of Staff, he is widely credited with restoring balance to a war-weary Army and leading the transformation to keep it relevant in the 21st century. Prior to this, General Casey commanded the Multi-National Force – Iraq, a coalition of more than 30 countries.

General Peter Chiarelli, United States Army (Retired), was the Deputy G3, Operations, Training, and Mobilization, commanding the Army Operations Center in the Pentagon during the 9/11 terrorist attacks and for the first two years of the wars in Afghanistan and Iraq. He commanded at all levels, deploying and commanding the 1st Cavalry Division in Iraq in 2004-2005 and Multinational Corps Iraq in 2006. General Chiarelli was Senior Military Assistant to Secretary of Defense Robert Gates and served as the 32nd Vice Chief of Staff of the Army for almost four years before retiring in 2012 with almost 40 years of service.

General Carlton W. Fulford, Jr., United States Marine Corps (Retired), received his commission in June 1966, following graduation from the U.S. Naval Academy. He served as a platoon and company commander in Vietnam. Over the next four decades, he served as Commanding Officer, Task Force Ripper during Operations Desert Shield and Desert Storm; Commanding General, First Marine Expeditionary Force; Commanding General, Third Marine Expeditionary Force; Commander, U.S. Marine Forces Pacific; and Director, The Joint Staff. General Fulford retired as the Deputy Commander-in-Chief, United States European Command in 2002.

General Michael Hayden, United States Air Force (Retired), entered active military service in 1969. During his career, he rose to the rank of four-star general and served as Director of the Central Intelligence Agency and the National Security Agency. General Hayden also served as Commander of the Air Intelligence Agency and held senior staff positions at the Pentagon, Headquarters U.S. European Command, and the National Security Council.

Former Secretary of the Air Force Deborah Lee James served as the 23rd Secretary of the Air Force, nominated by President Barack Obama and confirmed by the Senate in 2013. Previously, Ms. James worked as the Assistant to the Secretary of Defense for Legislative Affairs before being nominated by President Bill Clinton and confirmed by the Senate in 1993 as Assistant Secretary of Defense for Reserve Affairs.

General John Jumper, United States Air Force (Retired), is an Air Force Fighter Pilot, Instructor, and Commander, accumulating more than 1,400 combat flying hours and serving as the 17th Chief of Staff of the U.S. Air Force. He has commanded a fighter

squadron, two fighter wings, a numbered Air Force, U.S. Air Forces in Europe, and Allied Air Forces Central Europe, and he was Commander of the Air Combat Command, the Air Force's largest command. General Jumper went on to serve at the Pentagon as Deputy Chief of Staff for Air and Space Operations, and as the Senior Military Assistant to two Secretaries of Defense.

General Charles Krulak, United States Marine Corps (Retired), served as 31st Commandant of the Marine Corps. General Krulak's long and distinguished military career included two tours of duty in Vietnam and service as commanding general of the 2nd Force Service Support Group during the Gulf War. His other commands include commanding general of the Marine Forces Pacific; director of the USMC Force Structure Planning Group, where he developed the strategic vision of the U.S. Marine Corps for the 21st century; and deputy director of the White House Military Office.

Admiral Samuel Jones Locklear, III, United States Navy (Retired), graduated from the U.S. Naval Academy in 1977. He served for 39 years and retired as commander of U.S. Pacific Command. His prior commands include Commander, U.S. Naval Forces Europe, U.S. Naval Forces Africa, and Allied Joint Force Command Naples; Commander, U.S. 3rd Fleet; and Commander, Nimitz Strike Group.

Former Secretary of the Navy Ray Mabus served as the 75th Secretary of the Navy from 2009 to 2017, the longest to serve as leader of the Navy and Marine Corps since World War I. Before his appointment as Secretary, he held a number of leadership positions, including serving as the Governor of Mississippi and Ambassador to Saudi Arabia.

General Robert Magnus, United States Marine Corps (Retired), was the 30th Assistant Commandant of the Marine Corps. He enlisted in the Naval Reserve while a junior in high school. He was commissioned in 1969 and was designated as a Naval Aviator. He served as Commander, Marine Corps Air Bases Western Area, and Deputy Commander, Marine Forces Pacific. When he retired in 2008 after 38 years of distinguished service, he was the last active-duty officer of the Marine Corps who had served during the Vietnam War.

General Craig McKinley, United States Air Force (Retired), retired as a four-star general in November 2012 after 38 years of service. His last assignment was as the Chief of the National Guard Bureau, where he also served as a member of the Joint Chiefs of Staff. In this capacity, he was a military adviser to the President, the Secretary of Defense, and the National Security Council, and he was the Department of Defense's official channel of communication to the Governors and to State Adjutants General on all matters pertaining to the National Guard.

Admiral John B. Nathman, United States Navy (Retired), graduated from the U.S. Naval Academy in 1970 and qualified as a Naval Aviator in 1972. He served in a variety of sea, shore, and joint assignments, and he flew over 40 different types of aircraft in his career. Admiral Nathman served as the 33rd Vice Chief of Naval Operations from August 2004 to February 2005 and subsequently assumed command of U.S. Fleet Forces Command. He retired in May 2007.

Former Secretary of the Navy Sean O'Keefe began his public service career in 1978 at the Department of Defense and as U.S. Senate staff until his appointment as the Department of Defense Comptroller and

Chief Finance Officer in 1989. Subsequently, President George H.W. Bush named him the 69th Secretary of the Navy. Secretary O'Keefe also served in President George W. Bush's Administration as Deputy Director of the Office of Management and Budget and the 10th Administrator of NASA.

Admiral Bill Owens, United States Navy (Retired), retired in 1996 as the Vice Chairman of the Joint Chiefs of Staff. He began his career as a nuclear submariner, spending a total of 4,000 days—or more than ten years—aboard submarines, including duty in Vietnam. Admiral Owens was a senior military assistant to two Secretaries of Defense and served as commander of the U.S. 6th Fleet during Operation Desert Storm.

Admiral Scott Swift, United States Navy (Retired), served in the U.S. Navy for more than 40 years, rising from his commission through the Aviation Reserve Officer Candidate program to become a Navy light attack and strike fighter pilot. He held command seven times, completing his uniformed career as the 35th Commander of U.S. Pacific Fleet in 2018.

General Charles F. Wald, United States Air Force (Retired), served over 35 years, with more than 3,600 flying hours and 430 combat hours, and retired as a four-star general. General Wald commanded the 31st Fighter Wing at Aviano Air Base, Italy, where he led one of the initial strike packages for NATO in the Bosnia-Herzegovina conflict. In September 2001, General Wald led the development of the coalition response and air campaign against the Taliban in Operation Enduring Freedom. In his last position, he served as deputy commander of U.S. European Command.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution subjects the armed forces of the United States to civilian control and the rule of law. These limits on the military are bedrock features of our democracy and are deeply rooted in our nation's history. From the Founding to the present day, a steadfast commitment to these principles has successfully guided us through two world wars and numerous other conflicts; provided the stability needed for our democratic republic to flourish; and ensured that the military has the capacity to defend our nation by being trained and ready to fight and win its wars.

Petitioner's theory of presidential immunity from criminal prosecution is an assault on these foundational commitments. The notion of such immunity, both as a general matter, and also specifically in the context of the potential negation of election results, threatens to jeopardize our nation's security and international leadership. Particularly in times like the present, when anti-democratic, authoritarian regimes are on the rise worldwide, such a threat is intolerable and dangerous.

First, the Founders enshrined the principle of civilian control of the military in our Constitution by establishing the President as the Commander-in-Chief, *see* U.S. Const. art. II, § 2, and by imbuing Congress with supplemental authority over the military, *see id.* art. I, § 8, cl. 11-12. Congress has exercised this authority to create additional positions of civilian leadership within the armed forces, such as the Secretary of Defense. Ensuring that our military remains adequately subject and responsive to civilian control requires trust in and respect for the different

roles that these elected and appointed civilian officials and career military leaders are called to play.

Petitioner's theory that the President is absolutely immune from criminal prosecution, if accepted, has the potential to severely undermine the Commander-in-Chief's legal and moral authority to lead the military forces, as it would signal that they *but not he* must obey the rule of law. Under this theory, the President could, with impunity, direct his national security appointees to, in turn, direct members of the military to execute plainly unlawful orders, placing those in the chain of command in an untenable position and irreparably harming the trust fundamental to civil-military relations. Petitioner's contention that the availability of criminal prosecution would deter the President from taking the bold action the office requires, including military action, is profoundly ahistorical: the absence of absolute immunity has been assumed since the Founding and has presented no challenge to Presidents discharging their duties.

Second, the rule of law is critical to the military's mission and to the people's trust in the armed forces. The military service members' duty to disobey unlawful orders plainly illustrates this point. This duty requires service members, who are bound to obey all lawful orders, to disregard patently unlawful orders from their superiors and prohibits service members from using such orders as a defense to criminal prosecution. Immunizing the Commander-in-Chief from criminal prosecution, as Petitioner argues for here, would fly in the face of that duty, creating the likelihood that service members will be placed in the impossible position of having to choose between following their Commander-in-Chief and obeying the laws enacted by Congress. And it would threaten the

unity of the chain of command, from civilian leaders to military leaders down to units and service members, upon which the proper functioning of the military depends. Not only does Petitioner's approach threaten to inject chaos into military operations, it also threatens to damage—potentially irreparably—the public's trust in the military and the willingness of recruits to join the armed forces.

Third, here, Petitioner's position implicates the peaceful transition of power—a hallmark feature of American democracy—by permitting the President to take actions that would harm our national security and undermine our role as the international standard-bearer of democracy. Presidential transitions are times of significant national security risk. Leaders in the outgoing administration must prepare their successors to take the reins, and any complications in this handoff can diminish the successors' preparedness to handle national security threats. Foreign countries also closely observe American elections, and domestic conflict on U.S. soil—especially conflict related to the peaceful transition of power—only encourages our foreign adversaries.

Relevantly here, three former military officers and officials have filed an amicus brief in claimed support of Petitioner, but they do not meaningfully defend his theory of absolute immunity—indeed, they expressly decline to endorse it. *See* Br. for Three Former Sr. Mil. Officers & Exec. Branch Officials as *Amici Curiae* Supporting Pet'r, *Trump v. United States*, __ S. Ct. __ (2024) ("Officers' Br."). Instead, they admit that Presidents lack the authority to order the assassination of political rivals. However, they do not have an adequate answer to what happens when the President exceeds the bounds of his authority and issues unlawful orders he intends

to be followed. The only solution they offer is the unfounded prediction that military officers and officials would defy presidential orders to commit crimes—at least with respect to assassinations of political rivals—and thus that immunity does not pose grave concerns. Notably, Petitioner has not made this argument. And the notion that predicted defiance of the Commander-in-Chief's orders is the backstop against criminal behavior by a President is not what the Constitution provides for. It would inexorably lead to deep divisions between the armed forces' political and military leaders and would place servicemen and women in the impossible position of either ignoring presidential orders they are sworn to obey or committing crimes at the President's behest in violation of their oath—for which they may be prosecuted.

Petitioner's arguments, and those of his *amici*, are contrary to the foundational principles of our democracy. The Court should affirm.

ARGUMENT

I. Petitioner's claimed immunity would undermine our nation's foundational commitment to civilian control of the military.

The Founders enshrined in our Constitution the principle that the military must be apolitical and subject to civilian control to ensure the military serves and does not threaten civil society. This commitment to civilian control bound by the rule of law was integral to the Framers' design and is equally important today. Granting the President immunity from criminal prosecution would permit the Commander-in-Chief wide latitude to abuse his powers over the military, upsetting the foundational notion of civilian control subject to

the rule of law and the delicate dynamics that shape civil-military relations.

The early history of our Republic illustrates the foundational nature of the principle of civilian control of the military. The Founders were well aware of the tyrannical threat that unchecked military power and an "unlimited executive power" posed to individual rights and a democratic polity. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) ("The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."). For example, they rebelled against the Quartering Act of 1765, which required American colonists to house and feed British soldiers as part of an authoritarian response to the Boston Tea Party. 5 Geo. 3, c.33 (1765). And the Declaration of Independence expressly accused King George III of "render[ing] the Military independent of and superior to the Civil Power." The Declaration of Independence para. 14 (U.S. 1776); *see also* 1 Gian Gentile et al., *The Evolution of U.S. Military Policy from the Constitution to the Present* 13 (2020), https://perma.cc/BR95-L9UX ("Americans perceived the British Army to be separated from the society it served and to be more a tool for suppressing internal dissent than for providing security against external threats.").

Against this backdrop, the Founders designed our constitutional system such that the military serves civil society, not vice versa. Article 2, Section 2 of the Constitution establishes civilian control of the armed forces by subjecting the military to the control of the President—an elected civilian official—who serves as

Commander-in-Chief. *See* U.S. Const. art. 2, § 2. Moreover, Congress—a democratically elected civilian body—has the authority to declare war, appropriate money for the military, and create rules and regulations for the armed forces. *See id.* art. I, § 8, cl. 11-12.[2]

During the Founding Era, military and civilian leaders alike worked to establish and engrain the norms between the American military and the civilian leadership to which it is subordinate. As commander of the Continental Army, General George Washington firmly appealed to military officers that they must respect Congress's authority, as doing otherwise would "open the flood Gates of Civil Discord." *See* George Washington, Newburgh Address (Mar. 15, 1783), *in* From George Washington to Officers of the Army, 15 March 1783, Founders Online, National Archives, https://perma.cc/5KVR-62ZM. General Washington also repeatedly refused calls to convert his status as a military leader into that of an authoritarian leader of the nascent American confederacy. *See* Ralph H. Gabriel, American History and the Constitution in School of the Citizen Soldier 131, 186-189 (Robert A. Griffin ed., 1942). And as President, Washington continued to underscore the principle of civilian control in military deployments. *See, e.g.*, Letter from President

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[2] Petitioner's theory of presidential immunity threatens to subvert the careful balance between the executive and legislative branches struck in the Constitution. For example, if emboldened by absolute immunity, the President might unsuccessfully seek authorization from Congress to undertake a certain action and then attempt to have the military carry out that action even though Congress rejected it. Moreover, our Constitution directs the people's elected representatives in Congress to enact criminal laws that the executive is tasked with enforcing; allowing the President to violate those laws with impunity fundamentally distorts this constitutional allocation of power.

George Washington to Major General Daniel Morgan (Mar. 27, 1795), *in* 17 *The Papers of George Washington, 1 October 1794-31 March 1795*, 690-91 (David R. Roth, et al. ed., 2013), https://perma.cc/M7EW-QULF ("[I]t may be proper constantly and strongly to impress upon the Army [of militia sent against the 1794 Whiskey Rebellion insurrectionists] that they are mere agents of Civil power."). Other Founders echoed similar views. *See, e.g.*, The Federalist No. 46 (James Madison) ("Let a regular army . . . be entirely at the devotion of the federal government."); The Federalist No. 8 (Alexander Hamilton) (warning against "the military state becom[ing] elevated above the civil"); Thomas Jefferson, First Inaugural Address (March 4, 1801) (noting "the supremacy of the civil over the military authority" as an "essential principle").

Since the Founding, Congress has repeatedly buttressed this principle of apolitical, civilian control of the military. Congress has enacted legislation creating numerous civilian positions in the executive branch that exercise control over the armed forces, subject to the ultimate authority of the President. For example, pursuant to statute, the President appoints a Secretary of Defense "from *civilian* life" who must have at least seven years of separation from active military service. 10 U.S.C. § 113(a) (emphasis added).[3] The Secretary of Defense, alongside his secretariat and service secretaries, in turn leads the Department of Defense, gives orders to military leaders, and ensures the military implements the Commander-in-Chief's national security strategy and executes his orders. Additionally, federal

[3] A waiver of this separation requirement must be passed by both Houses of Congress and signed by the President. *See* Act of Jan. 20, 2017, Pub. L. No. 115-2, 131 Stat. 62; Act of Jan. 22, 2021, Pub. L. No. 117-1, 135 Stat. 3.

law reinforces the boundary between military and civilian life. *See, e.g.*, 10 U.S.C. § 973(b)(2) (prohibiting military officers from holding elected office or civilian presidential appointments).

Civilian control of the U.S. military ensures that the armed forces are subordinate to the direction and control of a President who is accountable to the people. The President exercises his authority through the civilians he appoints to lead the Department of Defense. Though career military leaders typically have far more experience in military affairs than the Department's civilian leaders, military leaders do not arrogate to themselves the authority of civilian leadership. They give their best military advice but leave the ultimate decisions to the President and his appointees.

Ensuring that this system works, however, requires more than just laws. It also requires deep trust between the civilian and military leaders that they fundamentally share common goals: to defend the nation and uphold the Constitution and the laws of the United States. Indeed, at its core, civilian control of the military requires mutual trust and respect for the different roles that civilian and military leaders are called to fill in our Constitutional order. In particular, our system requires trust in the Commander-in-Chief as a source of legal and moral authority to lead the men and women of the armed forces, as at his orders they place their lives in peril to serve their country. *See, e.g.*, Open Letter from Former Secretaries of Defense and Former Chairmen of the Joint Chiefs of Staff, *To Support and Defend: Principles of Civilian Control and Best Practices of Civil-Military Relations*, War on the Rocks (Sep. 6, 2022), https://perma.cc/KP6S-CQDU (emphasizing importance of mutual trust between civilian and military leadership).

Petitioner's theory of absolute presidential immunity from criminal prosecution would severely compromise this time-tested framework. Specifically, because service members must follow the orders of the Commander-in-Chief, even if they question the logic or prudence of those orders, it is imperative that the Commander-in-Chief and subordinate civilian appointees have the military's trust. Core to that trust is a baseline presumption that such orders are lawful. A President free to command the armed forces to carry out unlawful orders without any legal consequence for the Commander-in-Chief would threaten to destroy that trust. Such a President would be able to break faith with the members of the armed forces by placing himself above the very law they are both sworn to uphold.

Allowing the Commander-in-Chief to weaponize the powers of the U.S. military to criminal ends with impunity would also confront the President's civilian appointees and military officers with an impossible choice: whether to obey the orders of the Commander-in-Chief or the laws of the United States. Some political appointees might prioritize their loyalty to the President above their oaths and transmit the orders to violate the law, thus passing on to senior military leaders the dilemma of whether to obey the President or the law. Alternatively, should the President's civilian appointees and senior military leaders resign in protest or be summarily fired for refusing to obey the President's unlawful orders, the Department of Defense would be without the civilian and military leadership that is indispensable to safeguarding our national security. These fears are not theoretical. In 2020, the Secretary of Defense was removed after he issued a statement that the military had no role to play in responding to lawful civilian protests contrary to the wishes of the President. *See*

Helene Cooper et al., *Trump Fires Mark Esper, Defense Secretary Who Opposed Use of Troops on U.S. Streets*, N.Y. Times (Nov. 11, 2020). As all of these scenarios make clear, placing the President above the law would undermine the vital trust between civilian and military leaders on which our national security depends.

In sum, Petitioner's theory of absolute immunity is a frontal attack on the concept enshrined in the Constitution of a military subordinate to civil authority whose leaders, civilian and military, are sworn to uphold the Constitution and the laws of the United States.

II. Petitioner's claimed immunity would undermine the military's adherence to the rule of law and thus its orderly functioning and public trust.

The rule of law is foundational to our democracy generally and to the military's role in that democracy in particular. *See, e.g.*, The Federalist No. 51 (James Madison) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."); The Federalist No. 78 (Alexander Hamilton) (the federal judiciary ensures the Constitution is "preferred to the statute, the intention of the people to the intention of their agents"); Francis Fukuyama, *Political Order and Political Decay* 549 (2014) (modern democracies are "built on a tripod consisting of a modern state, rule of law, and democratic accountability"). Thus, the President and service members alike swear an oath to "defend" the Constitution. U.S. Const. art. II, § 1, cl. 8 (presidential oath of office); 10 U.S.C. § 502(a) (oath taken by "[e]ach person enlisting in an armed force"). Any suggestion that service members must abide by this oath, but that the military's senior civil-

ian leader—the Commander-in-Chief—need not, would be anathema to our Constitution and the rule of law.

Granting the President absolute immunity from criminal prosecution would threaten the good order and discipline that allow the armed forces to maintain a fighting force capable of protecting the safety of all Americans. Allowing for such immunity also would undermine our nation's trust in the military as a revered institution situated above and apart from the political fray.

This Court has long recognized that inculcating adherence to both the rule of law and the lawful orders of superior officers is essential to the military's national security mission. *See Little v. Barreme*, 6 U.S. 170, 179 (1804) (Marshall, J.) (describing service members' "implicit obedience . . . to the orders of their superiors" as "indispensably necessary to every military system"). Service members are obligated to defend the Constitution of the United States, "bear true faith and allegiance to the same," and "obey all orders of the President . . . and the orders of the officers appointed above [them], according to regulations and the Uniform Code of Military Justice" ("UCMJ"). 10 U.S.C. § 502(a). Service members repeat these solemn obligations in the oaths of enlistment to which they swear. *See id.* These vows are inviolable, no matter what sacrifices their duties call for.

Requiring the President to function within the rule of law and holding him accountable for violations of criminal law is particularly important given that service members have dual commitments: to abide by the orders of superior officers but to disobey any such orders that are unlawful. Significantly, service members' duties to obey the orders of the President and other superior officers extend only to the *lawful*

bounds of military authority. *See* 10 U.S.C. § 890 (UCMJ Art. 90) (providing that service members need only obey the "lawful command[s] of [their] superior[s]"); *see also* 10 U.S.C. § 892 (UCMJ Art. 92) (requiring court-martial for any member of the armed forces who fails to obey a "lawful" order).

That service members are required to disobey *unlawful* orders is commonly known as the "duty to disobey." The military thus imposes competing, but equally important, demands on its service members: they must follow superior orders even if "counter to their conscience, religion, or personal philosophy," with grave consequences for disobedience—unless and until an order is to "commit a war crime" or is otherwise "patently illegal." M. Keoni Medici & Joshua P. Scheel, *Practice Notes: Training the Defense of Superior Orders*, 6 Army Lawyer 34, 37 (2020), https://tjaglcs.army.mil/documents/35956/57374/The+Army+Lawyer+2020+Issue+6.pdf (citations omitted).

For service members, this duty to disobey is not a "lurid hypothetical[]." Pet'r Appl. for Stay at 24. If service members commit unlawful acts—even where ordered by a superior—they may face civil and criminal liability in both domestic courts and under international law. *See, e.g.*, *Little*, 6 U.S. at 179 (naval ship commander held personally liable for damages for seizing foreign fishing boat on President's illegal order); *United States v. Kinder*, 14 C.M.R. 742, 775, 786 (A.F.B.R. 1954) (upholding conviction of airman for premeditated murder and conspiracy to commit murder and rejecting argument that his actions were in furtherance of his officer-in-charge's orders).

The My Lai Massacre provides a vivid example of this principle. There, Army personnel murdered unarmed civilians in South Vietnam. Platoon leader Lieutenant

William Calley, Jr., was court-martialed and ultimately convicted at trial for killing 22 Vietnamese civilians. Fred L. Borch, *What Really Happened at My Lai on March 16, 1968? The War Crime and the Legal Aftermath*, 2018 Army L. 1, 2-3 (2018). He claimed a defense of superior orders—*i.e.*, that he was simply following orders from his commanding officer. *Id.* at 2. But, as the guilty verdict underscored, Lieutenant Calley's foremost obligation was to obey the *law*, which forbids premeditated killing of innocent civilians. *See United States v. Calley*, 48 C.M.R. 19, 29 (C.M.A. 1973) ("[T]here is no disagreement as to the illegality of the order to kill in this case. For 100 years, it has been a settled rule of American law that even in war the summary killing of an enemy, who has submitted to, and is under, effective physical control, is murder."). Conversely, although three U.S. servicemen who disobeyed Calley's orders and attempted to halt the massacre were initially denounced as traitors, the Army later awarded each of them the Soldier's Medal for bravery for shielding civilians from harm. *See* The Associated Press, *3 Honored for Saving Lives at My Lai*, N.Y. Times (March 7, 1998); *see also* Col. (Ret.) Paul E. Berg & Lt. Col. (Ret.) Robert J. Rielly, *The Moral Courage Paradox: The Peers Report and My Lai*, *in* Maintaining High Ground: The Profession and Ethic in Large-Scale Combat Operations 111, 121-23 (C. Anthony Pfaff & Keith R. Beurskens eds., 2021), https://perma.cc/86PQEJXN.

Petitioner's *amici* claim that the My Lai Massacre serves as evidence that the military would not carry out the President's hypothetical order to murder or assassinate a political rival. Officers' Br. 12. That is wrong: the very fact that Calley felt emboldened to kill civilians on the basis of "superior orders"—in that case, from a captain—demonstrates that our system remains vulnerable to the risk that servicemen or

women may commit crimes when ordered to do so. That risk is all the graver if the person giving the orders is the President, particularly one protected by absolute immunity. *Amici* are also incorrect in assessing the consequences of My Lai. Among other things, the hero of the incident, Hugh Thompson—who disobeyed Calley's orders and testified against him—became a target for death threats and harassment for doing so. The fallout from disobeying a *presidential* order would no doubt be far more severe.

Receiving an unlawful order thus places service members—already pushed to extremes by virtue of their vocation—in a nearly impossible position. On the one hand, disobeying a lawful order is punishable by court-martial and contrary to everything service members have been trained to do. On the other hand, the duty to disobey imposes on them the obligation not to rationalize obedience of an unlawful order simply out of deference to one's superiors—including the Commander-in-Chief. To the contrary, "[p]atently illegal orders overcome the presumption of obedience and must be disobeyed." Medici & Scheel, *supra*, at 37.[4]

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[4] The status of the defense of superior orders has evolved over time. *See* Medici & Scheel, *supra*, at 37 (describing evolution of defense of superior orders from 1914 to present). In the leadup to the International Military Tribunal ("IMT") at Nuremberg after World War II, the drafters of the London Charter, which established the IMT, eliminated "the possibility of impunity on the basis that defendants claimed to only be following orders," instead treating the defense merely as something that might mitigate punishment. *Id.* In the wake of Nuremberg, the modern duty to disobey emerged. *See id.*; *see also* Joint Serv. Comm. on Military Justice, Manual for Courts-Martial of the United States, R.C.M. 916(d) (2024 ed.) ("It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew

Given the practical difficulties of invoking the duty to disobey against orders from the Commander-in-Chief, the duty to disobey would be an unacceptably thin failsafe against a President who was intent on flouting and who was permitted to flout the law without the possibility of criminal prosecution. These risks are magnified when they implicate matters of national security, democratic integrity, and human rights.

It is no response that the President lacks lawful authority to undertake criminal acts, such as ordering the assassination of a political rival. Officers' Br. 1, 4-7. That was never in doubt. The issue in this case is what happens when the President exceeds the bounds of his lawful authority—and the Court should ensure that our legal system continues to disincentivize him from doing so in the first place.

Nor is it a response to speculate that military members would not carry out a criminal order from the President, including to murder or assassinate the President's political rival, thus rendering the subjugation of the President to criminal law an unnecessary deterrent. Officers' Br. at 1, 7-13. As discussed above, the duty to disobey is not a failsafe protection against unlawful orders—including orders to commit murder. Service members already face extremely fraught decisions inherent in the use of force. Our laws should not add to their burden by introducing further ambiguities as to which superior orders to follow. Instead, our laws should continue to provide service members with clear and consistent rules and standards that apply uniformly along the entire chain of command.

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the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.").

To that end, our legal system does and should continue to subject the President to criminal laws—just like every other individual in the chain of command—thereby lessening the likelihood that unlawful orders are issued in the first instance and reducing the risk that service members would be required to engage the precarious safety valve of the duty to disobey. Otherwise, our nation risks splintering the chain of command essential to training, organizing, and deploying service members efficiently and effectively across the globe, thereby jeopardizing the orderly functioning of our military.

Beyond increasing the likelihood that service members would face the fraught decision of whether to invoke the duty to disobey and undermine the chain of command necessary to our national security, Petitioner's theory would also remove specific checks on presidential authority over the military. For example, the Posse Comitatus Act of 1878 ("PCA") criminalizes the use of the armed forces to enforce civilian laws, subject to exceptions "expressly authorized" by Congress. 18 U.S.C. § 1385.[5] The PCA thus prevents Presidents from deploying the military within the United States to police civilian "compliance" with laws such as voting regulations. But, absent the availability of criminal prosecution for a President's violation of the PCA, this important check on military power would be weakened if not eliminated.

Finally, and critically, the commitment of the U.S. military, throughout the entire chain of command, to the

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[5] Some exceptions are longstanding, *see* 10 U.S.C. §§ 251-252 (the Insurrection Act), and the Insurrection Act enables Congress to authorize further exceptions as exigencies require, *see, e.g.*, 6 U.S.C. § 466 (affirming the importance of the PCA while authorizing exceptions for disaster relief).

Constitution and the rule of law is essential to retaining the armed forces' position as one of our nation's most respected institutions. This stature would be undermined were the military overseen by a President stripped of any threat of criminal prosecution, who might then be incentivized to misuse its coercive capacities. The military has historically been among the most trusted institutions in American life.[6] This is largely so due to the military's positioning above the fray of American politics, with the singular mission of protecting the nation's security and preserving its existence. *Amici* are gravely concerned that embracing presidential immunity from criminal prosecution would have negative follow-on effects that would tarnish the military's reputation and erode public trust. As but one example, an unaccountable President issuing unlawful orders may rightly encounter resistance from the military and its senior leadership, leading the President to cast the military as his or her political opponents. That would place military leaders in the untenable position of withholding competent military advice to the President in order to avoid the sanction of a President who is above the law. In turn, that would likely result in diminished public support for the military, which is, and must remain, apolitical.[7]

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[6] *See, e.g.*, *Confidence in Institutions*, Gallup, https://perma.cc/P97V-6BGJ (last visited April 2, 2024); Tom W. Smith & Jaesok Son, *General Social Survey 2012 Final Report: Trends in Public Attitudes about Confidence in Institutions*, National Opinion Research Center, https://perma.cc/F2CK-HPU5 (last visited April 2, 2024).

[7] Our military's future and the safety of our citizens depend on the military remaining apolitical. The U.S. military is an all-volunteer organization already facing serious recruiting shortfalls, and any threats to its legitimacy or reduction in its public perception could impair its ability to recruit the most qualified people to protect our country. *See* David Vergun, *DOD Addresses*

Petitioner's theory of absolute immunity, if adopted, would threaten the rule of law and accountability for those who violate it—fundamental principles in our democracy generally and in our military in particular. The ensuing damage to the military's functioning and reputation would unacceptably weaken our national security.

III. Petitioner's claimed immunity, by implicating the peaceful transition of power in particular, threatens national security.

Our nation's commitment to the peaceful transition of power is foundational to our democracy, critical to our national security agenda, and essential to our role as a democratic leader on the world stage. The election and inauguration of a new President presents the most visible and awe-inspiring display of our democratic process and commitment to constitutional safeguards. For nearly 250 years, American presidential administrations have peacefully changed hands. *See* Steve Abbot et al., *Passing Electoral Count Act Reforms Is Vital to National Security*, Mil. Times (Nov. 11, 2022), https://perma.cc/4FFE-4RKW. Such transitions have been stable and secure, even as the country experienced some of its most challenging episodes, including the leadup to the Civil War, presidential assassinations, and the sudden death of a President during World War II.[8]

Recruiting Shortage, Dept. of Defense News (Dec. 13, 2023), https://perma.cc/7GRE-NX5A.

[8] *See, e.g.*, Rebecca Onion, *The Presidential Transition That Shattered America*, Slate (Oct. 20, 2020), https://perma.cc/UDJ7-6Q7K; *Kennedy Fourth President Killed by Assassin; Attacks on Two Others Failed*, N.Y. Times (Nov. 23, 1963); Arthur Krock, *End Comes Suddenly at Warm Springs*, N.Y. Times (April 13, 1945).

But presidential transitions are also times of great national security risk. During such transitions, even as the United States continues to face threats from every corner of the globe, officials across the National Security Council, Departments of State, Homeland Security, and Defense, and other national security agencies must prepare their successors to step into their shoes. Mishandling this immense yet delicate process can have disastrous consequences. "These concerns are not just hypothetical." Steve Abbot et al., Statement of Former National Security Officials (Nov. 23, 2020), https://perma.cc/RB6H-A639; *see also* Paul Sonne, *Chaotic Presidential Transition Brings Vulnerability, Security Risk to Nation*, Wash. Post (Nov. 11, 2020). As the 9/11 Commission found, for example, the shortened transition to the George W. Bush Administration during the election dispute in 2000-2001 "hampered the new administration in identifying, recruiting, clearing, and obtaining Senate confirmation of key appointees," including those responsible for reviewing and responding to the mounting terrorism threat in the months leading up to the attacks of September 11, 2001. The 9/11 Commission Report 198-200, https://perma.cc/KWM2-KQP2. Thus, it is critical to minimize "the disruption of national security policymaking during the change of administrations." *Id.* at 422.

A stable, orderly presidential transition is essential to our national security. Military leaders abroad closely watch the United States as administrations transfer responsibility from one to another so that they can accurately advise political leaders on appropriate security measures. Unstable transitions of power—not to mention any attendant constitutional crises—risk catastrophic misperceptions abroad, embold-

ening our adversaries, demoralizing our allies, and causing chaos at home.

The already grave risks from an unstable presidential transition would be worse still if the President faced no accountability for undertaking criminal conduct to prevent the peaceful transition of power. As just one example, the Joint Chiefs might issue a directive[9] to recognize a new duly elected President only to have that order contradicted by a deposed President who wishes to stay in power. Such a situation would implicate the fraught decisions faced by service members confronting unlawful orders. *Supra* Section II. The ensuing turmoil from such dangerous circumstances would not only place service members in jeopardy but would also imperil America's national security and leadership role in the world.

For nearly a century—from the defeat of fascism to the support of nascent democracies during the Cold War to our government's current efforts to build democratic resilience and promote human rights—our political leaders have understood that promotion of democratic values abroad serves as a check on expansionist regimes and is vital for American national security interests. *See, e.g.*, Michael A. Weber, *Democracy and Human Rights in U.S. Foreign Policy* 2-9, Cong. Rsch. Serv., R47890 (2024), https://crsreports.congress.gov/product/pdf/R/R47890; *see also Democracy, Human Rights, and Governance*, United States Agency for International Development, https://perma.cc/9HX9-4T5N (last visited April 2, 2024); *Bureau of Democracy,*

[9] *See, e.g.*, Memorandum from the Joint Chiefs of Staff to the Joint Force (Jan. 12, 2021), https://perma.cc/G44F-9RCS ("On January 20, 2021, in accordance with the Constitution . . . President-elect Biden will be inaugurated and will become our 46th Commander in Chief.").

Human Rights, and Labor, United States Department of State, https://perma.cc/9966-LGTG (last visited April 2, 2024). Presidents across the political spectrum have agreed that promotion of democracy around the world is vital to our national security agenda because it reinforces global stability. Indeed, since Presidents began publishing National Security Strategies nearly 40 years ago, successive Administrations have emphasized the necessity of promoting democracy around the world. *See* White House, The National Security Strategy of the United States of America 3 (1988); White House, The National Security Strategy of the United States of America 4 (1991); White House, The National Security Strategy of the United States of America 22 (1995); White House, The National Security Strategy of the United States of America 21 (2002); White House, The National Security Strategy of the United States of America 37 (2010); White House, The National Security Strategy of the United States of America 8 (2022).

Our nation's international leadership and role as the standard-bearer of democracy is particularly important now. There has been a recent, troubling rise of authoritarian governments across the globe. For the first time in nearly two decades, the number of non-democratic countries outnumbers that of democratic countries. Sarah Repucci & Amy Slipowitz, *The Global Expansion of Authoritarianism*, Freedom House (2022), https://perma.cc/FJQ7-TVRK; *Authoritarians are on the March*, The Economist (Aug. 3, 2023), https://perma.cc/5Z43-FLSE.

During a time when authoritarian governments are becoming alarmingly powerful and increasingly prevalent, it is essential that the United States continues to be a model of a stable and well-functioning democracy.

Of vital importance to these rising authoritarian powers is the false narrative that the United States and other democracies have failed to deliver on the promise of political freedom, security, and rule of law. *See* Joseph Siegle, *Winning the Battle of Ideas: Exposing Global Authoritarian Narratives and Revitalizing Democratic Principles* 4 (2024), https://perma.cc/2DJW-HT4W. Adversaries have used that narrative to foment military coups in West Africa, stymie democratic movements in Latin America, and spark democratic backsliding across Asia and Eastern Europe. *Id.* at 4-5. Where authoritarian narratives reign, instability triumphs. *See also* Office of the Director of National Intelligence, Annual Threat Assessment of the Intelligence Community 3-4, 10-11, 17, 29 (2023), https://www.dni.gov/files/ODNI/documents/assessments/ATA-2023-Unclassified-Report.pdf; Maha Yahya, *The Middle East is on the Brink Again: The Risks of an Unstable Authoritarian Order*, Foreign Affairs (March 22, 2022), https://perma.cc/RJZ9-PHWZ.

Presidential immunity from criminal prosecution feeds those false and harmful narratives. Unless Petitioner's theory is rejected, we risk jeopardizing America's standing as a guardian of democracy in the world and further feeding the spread of authoritarianism, thereby threatening the national security of the United States and democracies around the world.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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April 8, 2024