IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DONALD J. TRUMP, Plaintiff-Appellee, v. **UNITED STATES OF AMERICA,** Defendant-Appellant.	No. 22-13005

MOTION FOR LEAVE TO FILE BRIEF
AS *AMICI CURIAE* IN SUPPORT OF
APPELLANT UNITED STATES OF AMERICA

Former federal government officials Donald B. Ayer, John B. Bellinger III, Gregory A. Brower, John J. Farmer Jr., Stuart M. Gerson, Peter D. Keisler, John M. Mitnick, Alan Charles Raul, Olivia Troye, William F. Weld, and Christine Todd Whitman respectfully move for leave to file the attached brief as *amici curiae* in support of Appellant United States of America. In support of their motion, *Amici* state the following:

This Court has authority to grant *amici curiae* leave to file in this matter pursuant to Federal Rule of Appellate Procedure 29 and Eleventh Circuit Local Rule 29. Amicus briefs can assist the court "in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by [e]nsuring a complete

and plenary presentation of difficult issues so that the court may reach a proper decision." *Mobile Cty. Water, Sewer & Fire Prot. Auth., Inc.* v. *Mobile Area Water & Sewer Sys., Inc.*, 567 F. Supp. 2d 1342, 1344 n.1 (S.D. Ala. 2008) (internal citations omitted), *aff'd*, 564 F.3d 1290 (11th Cir. 2009).

Amici respectfully submit that they have a special interest in this matter and can provide assistance to the Court. *Amici*, whose backgrounds are described more fully in the attached Appendix, are former federal prosecutors and federal government officials who served in Republican administrations, and who collectively have decades of experience advising on matters involving the proper scope of executive power and executive privilege or prosecuting cases involving sensitive or classified materials. *Amici* include those well-versed in the U.S. Department of Justice's investigatory procedures, both in connection with matters of great public interest and in cases involving the proper treatment of highly sensitive and classified government documents. Finally, *Amici*, as demonstrated by their lengthy periods of government service, are committed to ensuring that the rule of law and legal processes are respected and safeguarded in this country.

For the foregoing reasons, *Amici* respectfully request that this Court grant them leave to file the attached brief in support of Appellant United States of America.

Dated: October 21, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the applicable type-volume limitation under Federal Rule of Appellate Procedure 27(d)(2). According to the word-processing software's word count, there are 1,073 words in the applicable sections of this motion, including the appendix. I also certify that this motion complies with the applicable type-style requirements under Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (6). The motion was prepared in 14-point, Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2022, a true and correct copy of the foregoing document was filed with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the attorneys of record who are registered participants in the Court's electronic notice and filing system.

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APPENDIX: LIST OF *AMICI*

The *amici* listed below join this brief as individuals; institutional affiliation is noted for informational purposes only and does not indicate endorsement by institutional employers of the positions advocated in this brief.

Donald B. Ayer served as Deputy Attorney General at the U.S. Department of Justice ("DOJ") (1989 to 1990), Principal Deputy Solicitor General of the United States (1986 to 1989); and U.S. Attorney for the Eastern District of California (1981 to 1986). He has argued nineteen cases in the U.S. Supreme Court.

John B. Bellinger III served as the Legal Adviser for the Department of State (2005 to 2009); Senior Associate Counsel to the President and Legal Adviser to the National Security Council (2001 to 2005); Counsel for National Security Matters in DOJ's Criminal Division (1997 to 2001); Counsel to the Senate Select Committee on Intelligence (1996); General Counsel to the Commission on the Roles and Capabilities of the U.S. Intelligence Community (1995 to 1996); and Special Assistant to Director of Central Intelligence William Webster (1988 to 1991).

Gregory A. Brower has served as Assistant Director for the Office of Congressional Affairs at the Federal Bureau of Investigation, U.S. Attorney for the District of Nevada, and as both General Counsel and Inspector General at the U.S. Government Publishing Office. He also served five regular sessions in the Nevada Legislature, including as Chair of the Senate Judiciary Committee in 2015.

John J. Farmer Jr. has served as an Assistant U.S. Attorney, New Jersey Attorney General, Senior Counsel to the 9/11 Commission, and Dean of Rutgers Law School, and now serves as Director of the Eagleton Institute of Politics. He has also served on New Jersey's Executive Commission on Ethical Standards, Advisory Committee on Judicial Conduct, and the State Commission of Investigations.

Stuart M. Gerson served as Acting Attorney General of the United States during the early Clinton Administration. He also served as President George H.W. Bush's appointee as Assistant Attorney General for the Civil Division of the DOJ, as an advisor to several presidents, and as an Assistant U.S. Attorney for the District of Columbia (1972 to 1975).

Peter D. Keisler served as Acting Attorney General of the United States during the George W. Bush Administration. He served as Assistant Attorney General for the DOJ's Civil Division (2003 to 2007), as Principal Deputy Associate Attorney General and Acting Associate Attorney General from (2002 to 2003), and as Assistant and Associate Counsel to President Ronald Reagan in the Office of White House Counsel (1986 to 1988).

John M. Mitnick served as General Counsel of the Department of Homeland Security (2018 to 2019); Associate Counsel to the President (2005 to 2007); Deputy Counsel, Homeland Security Council (2004 to 2005); Associate General Counsel for Science and Technology, Department of Homeland Security (2003 to 2004); and Counsel to the Assistant Attorney General (Antitrust), DOJ (2001 to 2002).

Alan Charles Raul served as Associate Counsel to President Ronald Reagan in the Office of White House Counsel (1986 to 1988); General Counsel of the Office of Management and Budget in the Executive Office of the President (1988 to 1989); General Counsel of the U.S. Department of Agriculture (1989 to 1993); and Vice Chairman of the White House (and, later, independent) Privacy and Civil Liberties Oversight Board (2006 to 2007; 2007 to 2008).

Olivia Troye served as Special Advisor to the Vice President for Homeland Security & Counterterrorism (2018 to 2020); Chief in the Department of Homeland Security (2016 to 2018); Senior Advisor to the Director of Intelligence & Counterintelligence for the Department of Energy (2015 to 2016); Advisor to the Director of the National Counterterrorism Center (2007 to 2010); and Advisor in the Department of Defense appointed by President George W. Bush (2002 to 2007).

William F. Weld served as the U.S. Attorney for Massachusetts (1981 to 1986), as Assistant U.S. Attorney General in charge of the DOJ's Criminal Division (1986 to 1988), and as Governor of Massachusetts (1991 to 1997).

Christine Todd Whitman served as Governor of New Jersey (1994 to 2001) and as Administrator of the Environmental Protection Agency (2001 to 2003) during the George W. Bush Administration. She serves on a number of non-profit boards including the Board of Trustees' Executive Committee of the Eisenhower Fellowships and as the Chair of the American Security Project.

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[PROPOSED] BRIEF OF FORMER FEDERAL GOVERNMENT OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT UNITED STATES OF AMERICA

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, *Amici* former federal government officials provide this Certificate of Interested Persons and Corporate Disclosure Statement. To the best of *Amici*'s knowledge, the following persons and entities may have an interest in the outcome of this case:

American Broadcasting Companies, Inc. (DIS)

Associated Press

Ayer, Donald B.

Bloomberg, LP

Bellinger III, John B.

Bratt, Jay I.

Brill, Sophia

Brower, Gregory A.

Cable News Network, Inc. (WBD)

Cannon, Hon. Aileen M.

Caramanica, Mark Richard

CBS Broadcasting, Inc. (CBS)

Cole, William Francis

Corcoran, M. Evan

Cornish Sr., O'Rane M.

Cunningham, Clark

Dearie, Hon. Raymond J.

Democracy 21

Dow Jones & Company, Inc.(DJI)

Edelstein, Julie

Eisen, Norman L.

E.W. Scripps Company (SSP)

Farmer Jr., John J.

Fischman, Harris

Finzi, Roberto

Fry, Samantha C.

Fugate, Rachel Elise

Gerson, Stuart M.

Gonzalez, Juan Antonio

Gray Media Group, Inc. (GTN)

Griffith, Hon. Thomas B.

Gupta, Angela D.

Halligan, Lindsey

Huck Jr., Paul

Inman, Joseph M.

Jones, Hon. Barbara S.

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Keisler, Peter D.

Kessler, David K.

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NBC Universal Media, LLC (CMCSA)

Norman Eisen PLLC

Olsen, Matthew G.

Patel, Raj K.

Paul, Weiss, Rifkind, Wharton & Garrison LLP

Rakita, Philip

Raul, Alan Charles

Reed, Jenea M.

Reeder Jr., L. Martin

Reinhart, Hon. Bruce E.

Rosenberg, Robert

Seidlin-Bernstein, Elizabeth

Shapiro, Jay B.

Shullman, Deanna Kendall

Smith, Jeffrey M.

Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

The New York Times Company (NYT)

The Palm Beach Post

Times Publishing Company

Tobin, Charles David

Troye, Olivia

Trump, Donald J.

Trusty, James M.

United States of America

Weld, William F.

Wertheimer, Fred

Whitman, Christine Todd

WP Company LLC

To the best of *Amici*'s knowledge, no other persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this case or appeal.

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INTEREST AND IDENTITY OF *AMICI CURIAE*[1]

Amici former federal government officials Donald B. Ayer, John B. Bellinger III, Gregory A. Brower, John J. Farmer Jr., Stuart M. Gerson, Peter D. Keisler, John M. Mitnick, Alan Charles Raul, Olivia Troye, William F. Weld, and Christine Todd Whitman seek leave of the Court to file this amicus brief pursuant to Federal Rule of Appellate Procedure 29(a)(2).

Amici all served in Republican administrations and collectively have decades of experience prosecuting and litigating cases involving sensitive or classified materials, reviewing and declassifying Executive Branch materials for congressional committees, review boards, independent counsel, or for use in public reports, or advising on matters regarding the proper scope of executive power and executive privilege. They have substantial experience with the structure and process of law enforcement investigations, including investigations involving public officials. Given their decades of public service, familiarity with the law enforcement and constitutional matters at issue here, and commitment to the rule of

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

law, *Amici* maintain an active interest in the proper resolution of the important questions raised by the Government's appeal.

STATEMENT OF THE ISSUES

1. Whether the district court erred in exercising jurisdiction over plaintiff's motion requesting review by a special master of all materials seized pursuant to a court-authorized search in an ongoing criminal investigation, in part because of its improper consideration of the plaintiff's status as the former President of the United States.

2. Whether the district court erred by enjoining the Government from reviewing and using seized materials for criminal investigative purposes, including records bearing classification markings, pending the special master review, as this extraordinary intervention was adverse to the public interest in ensuring that the law is applied, and appears to be applied, consistently across cases.

3. Whether the district court erred by ordering a special master review of all seized materials, including records bearing classification markings, and entering its injunction pending that review, where the plaintiff failed to establish a need for this extraordinary relief, including because the plaintiff has no plausible claims of a possessory interest in classified materials or of executive privilege against the Department of Justice in the context of an ongoing criminal investigation.

SUMMARY OF THE ARGUMENT

Amici respectfully submit this brief in support of the Government's appeal of the district court's September 5, 2022 order authorizing the appointment of a special master to review seized materials for claims of executive and attorney-client privilege and enjoining the Government's criminal investigation pending that special master review. DE.64.[2] The district court's order repeatedly granted the plaintiff in this case, former President Donald J. Trump, procedural rights and protections that are not afforded to other criminal defendants and subjects of criminal investigations. This special treatment of one private citizen by virtue of his former status runs contrary to well-established caselaw. But, even more important, the analysis employed by the district court is antithetical to the central principle in this country that everyone should be treated equally by the law. The district court's order should be reversed.

First, the district court improperly considered the plaintiff's status as a former president in finding that the threat to him of future prosecution and putative risk to his reputation constituted irreparable injury. That analysis deviated from well-established caselaw, which holds that a threat of future prosecution and potential reputational injury is never sufficient to establish irreparable injury. Nor

[2] References to "DE" refer to docket entries in the district court proceedings, *Trump* v. *United States of America*, No. 22-cv-81294 (S.D. Fla.), filed with the Court in the Appendix of Appellant United States.

did the district court provide any basis for creating special procedural protections from the threat of future prosecution and reputational costs that apply only to one particular private citizen. In the decades of experience *Amici* collectively have in state and federal law enforcement, *Amici* have never observed a court treat the subject of a criminal investigation with such solicitude simply because the subject used to be a public official. In *Amici*'s experience, it is critical to the rule of law that the subjects of criminal investigations be treated equally, regardless of their former occupation.

Second, in finding that the public interest would be best served by enjoining aspects of the Government's criminal investigation, the district court ignored the public's interest in ensuring that the law is applied, and appears to be applied, consistently across cases. The district court's extraordinary intervention on behalf of former President Trump threatens public confidence that the law will be applied fairly and equally to all criminal defendants or subjects of criminal investigations.

Third, the district court grounded its appointment of a special master on the erroneous assumption that the former President may have a possessory interest in classified materials or a claim of executive privilege against the Department of Justice in an ongoing criminal investigation. In doing so, the district court ignored clear precedent to the contrary and failed to adequately justify the extraordinary relief it granted.

BACKGROUND

This dispute relates to the Government's efforts to recover government records, including classified documents, from former President Trump's Mar-a-Lago estate. After many months of escalating requests, including a grand jury subpoena seeking classified documents, the Government executed a warrant to search Mar-a-Lago on August 8, 2022. DE.48:7–8, 12. Several days later, on August 22, former President Trump initiated this action by filing a Motion for Judicial Oversight and Additional Relief. The motion asked the district court to, among other things, appoint a special master to review all of the materials seized from Mar-a-Lago. *See* DE.1:1, 14.

On September 5, the district court issued an order: (i) authorizing the appointment of a special master to review the seized materials, including for personal items or documents and materials potentially subject to claims of attorney-client or executive privilege; and (ii) temporarily enjoining the Government from reviewing and using the seized materials in its criminal investigation pending completion of that review. DE.64.

The September 5 order authorized the special master to review all of the seized materials for records subject to the attorney-client privilege, finding that "[e]ven if DOJ filter teams often pass procedural muster, they are not always perceived to be as impartial as special masters," and allowed the plaintiff to assert

a novel claim of executive privilege on the basis that such a claim had not yet been explicitly precluded by the Supreme Court. DE.64:16–17. In enjoining the Government, the district court relied heavily on what it perceived to be the need to shield the plaintiff from the "serious, often indelible stigma associated" with the threat of a future prosecution against a former president, while also affirming "the need to ensure at least the appearance of fairness and integrity under the extraordinary circumstances presented." DE.64:1, 10.

The Government appealed the district court's decision to this Court and moved in the district court for a partial stay pending appeal "to the extent the Order (1) enjoins the further review and use for criminal investigative purposes of records bearing classification markings that were recovered pursuant to a court-authorized search warrant and (2) requires the government to disclose those classified records to a special master for review." DE.69:1.

The district court denied the Government's partial stay motion. Among other things, the order denying the partial stay refused to accept the Government's sworn statements as to the status of the classified materials, and repeatedly deemed the public and national security interests in the continued investigation less compelling than the plaintiff's individual interests. DE.89. The Government then

sought a stay from this Court of the district court's September 5 order as it related to classified materials, and the Court granted that stay on September 21.

Pursuant to this Court's expedited briefing schedule, the Government filed its opening brief in this appeal on October 14. The Government argued that the district court erred by exercising equitable jurisdiction because former President Trump failed to show a "callous disregard" by the Government for his constitutional rights and because all of the other equitable factors also weighed against jurisdiction. The Government also argued that, even if jurisdiction were proper, the district court erred in enjoining the Government from further reviewing or using the seized materials pending special master review because none of the preliminary injunction factors supported that relief. In particular, former President Trump failed to show a likelihood of success on the merits, because executive privilege cannot be asserted in these circumstances and there was no need for special master review as to attorney-client privilege. For the same reasons, the Government argued that the district court erred in ordering the special master review. It requested that this Court reverse the district court's September 5 order with instructions to dismiss the case.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONSIDERING PLAINTIFF'S STATUS AS A FORMER PRESIDENT IN FINDING THAT THE THREAT OF PROSECUTION CONSTITUTED "IRREPARABLE INJURY."

A motion for the return of property pursuant to Federal Rule of Criminal Procedure 41 requires that the court first determine whether it may exercise equitable jurisdiction. To determine whether the exercise of equitable jurisdiction was warranted, the district court applied the factors identified in *Richey* v. *Smith*, 515 F. 2d 1239 (5th Cir. 1975). In its evaluation of the third *Richey* factor—risk of irreparable injury—the district court improperly considered the plaintiff's status as a former president in finding that the threat to him of future prosecution constituted irreparable injury. The district court's consideration of this issue violated well-established law that, as a general matter, the collateral consequences of a potential, future criminal prosecution, including "the cost, anxiety, and inconvenience of having to defend against" it, cannot "by themselves be considered 'irreparable' in the special legal sense of that term." *Younger* v. *Harris*, 401 U.S. 37, 46 (1971). The caselaw simply does not recognize an irreparable injury in the collateral consequences of future prosecution, let alone recognize that alleged reputational harm to an individual from the mere investigation of suspected criminal activity constitutes such an injury.

The district court did not dispute the relevance of this caselaw. Instead, it distinguished the plaintiff in this case from all other subjects of lawfully executed searches on the basis that, "[a]s a function of Plaintiff's former position as President of the United States, the stigma associated with the subject seizure is in a league of its own" and that "[a] future indictment . . . would result in reputational harm of a decidedly different order of magnitude." DE.64:10. Put simply, the district court held that former President Trump's reputation is more valuable, or worthy of protection, than are the reputations of other subjects of lawful searches. There is no basis for this ruling in caselaw, and it violates the most essential assurance of the rule of law: that everyone is to be treated equally under the law.

The appellate record shows that the search of Mar-a-Lago was conducted pursuant to a judicially authorized warrant, preceded by months of investigation that included efforts to obtain the return of the records at issue either with former President Trump's consent or pursuant to a grand jury subpoena. The materials were seized pursuant to that warrant and in accordance with the filter procedures approved by the Magistrate Judge, and the Government began its review of those records after seizing them. There is nothing remarkable about this process from the perspective of criminal law and procedure.

What is remarkable is the district court's unprecedented step of halting aspects of the Department of Justice's criminal investigation out of concern for

former President Trump's reputation. Under the district court's analysis, if the exact same investigation, search, and seizure had taken place with respect to records belonging to any other individual located in the United States (other than possibly another former president), then the result would have been quite different. There would be no special master, and no pause on the investigation. In other words, the district court afforded this plaintiff greater, and unprecedented, protection from a criminal investigation simply because of his former position as a public official.

The district court offered no justification for its unprecedented deference to the plaintiff by virtue of his former position. Nor could there be any justification. After all, the reason that prior caselaw has refused to recognize reputational harm or other collateral consequences of prosecution as sufficient to constitute irreparable injury is not because these cases found these consequences to be trivial. In every case, the consequences of a future criminal prosecution are real and substantial—arguably even more so for an individual who lacks the financial resources and professional connections of a former president. These consequences are ones that courts have routinely found to be necessary and acceptable to ensure society's broader interests in the orderly administration of the nation's criminal laws. *See, e.g.*, *Deaver* v. *Seymour*, 822 F.2d 66, 69 (D.C. Cir. 1987) (noting that, although "an innocent person may suffer great harm to his reputation . . . by being

erroneously accused of a crime, all citizens must submit to a criminal prosecution brought in good faith so that larger societal interests may be preserved"); *see also* *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940) ("Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship."). Therefore, even if this Court were to accept the district court's unsupported suggestion that this plaintiff will face more grievous reputational harm due to the threat of future prosecution than would other individuals, this still could not amount to "irreparable injury" under the law.[3]

Amici collectively have decades of experience in federal law enforcement, and have overseen hundreds of criminal investigations. They well understand the collateral consequences of criminal investigations and potential prosecutions, and have seen those consequences play out in the lives of ordinary Americans as well as current and former public officials. The notion that the plaintiff in this case, because of his status as a former president, should be spared those same consequences runs contrary to *Amici*'s decades of experience and the most basic understanding of the way our criminal justice system operates.

[3] The same would be true if the subject of this search were any other former president, including one from a different political party. If the Department of Justice had probable cause to search the property of any former president, then a court should not question that search or interject itself into that investigation solely to protect that former president's reputation.

The necessity of equal treatment under the law is especially evident with regard to the handling of classified information. Every current and former national security official and member of the military—including many of the *Amici*—knows that if they took classified documents home and, in response to voluntary requests and a grand jury subpoena, refused to return them to the Government, they would be promptly investigated and, if warranted, prosecuted, without regard to any injury to their reputation.

In sum, the district court erred in considering former President Trump's status in its evaluation of irreparable injury. The court misapplied well-established caselaw and abandoned the fundamental principle that no one is above the law.

II. THE DISTRICT COURT ERRED IN FINDING THAT THE PUBLIC INTEREST WOULD BEST BE SERVED BY ENJOINING THE GOVERNMENT'S CRIMINAL INVESTIGATION.

In finding under Federal Rule of Civil Procedure 65 that the injunction "would not be adverse to the public interest," DE.64:20, the district court ignored not just the public's interest in the unobstructed completion of that investigation, but the public's even greater interest in ensuring that the law is applied, and appears to be applied, consistently across cases.

The district court portrayed its unprecedented injunction of the criminal investigation and imposition of special master review as ensuring "an orderly process that promotes the interest and perception of fairness." DE.64:22. But the

court failed to address, let alone justify, why the civil and criminal procedures that apply in thousands of other cases across the country every day are insufficient to provide an "orderly process" that promotes fairness. Moreover, it ignored the troubling impression left by the provision of extraordinary relief to a private individual by virtue of his former political office.

Amici have decades of experience overseeing policy formulation and individual case decisions at various levels of the United States justice system. In *Amici*'s experience, public confidence in the justice system is critical for its functioning, and the best method of instilling public confidence in law enforcement and the rule of law is to treat individuals equally under the law. Without that confidence, our justice system, which requires even innocent citizens to "submit to a criminal prosecution brought in good faith so that larger societal interests may be preserved," will fail. *See Deaver*, 822 F.2d at 69. In exercising its equitable power to grant an injunction, the district court ignored this fundamental consideration. Indeed, in purporting to create an orderly and fair process for a particular private individual, the district court has not only departed from the principles that would achieve such an outcome in this case, but also undermined the perception of fairness of the procedures applied in everyday investigations and prosecutions.

Ultimately, the district court's extraordinary intervention on former President Trump's behalf, contrary to controlling caselaw and basic principles of

the justice system, threatens public confidence that the law will be applied fairly and equally to all criminal defendants or subjects of criminal investigations. This Court should correct the district court's error.

III. THE DISTRICT COURT ERRED IN GRANTING EXTRAORDINARY RELIEF ON THE BASIS OF FLAWED AND UNSUPPORTED ARGUMENTS.

The district court made critical and obvious errors in its analysis of the underlying legal principles purporting to justify its appointment of a special master and injunction pending that review. In particular, on numerous occasions, the court accepted demonstrably flawed arguments asserted by former President Trump.

A. The District Court Erred In Finding That Former President Trump Could Have A Possessory Interest In Classified Records.

To succeed on a motion for the return of property, an applicant must at least allege a colorable possessory interest in the seized materials. The district court's order denying the Government's request for a partial stay of its September 5 order expanded on its reasoning for how former President Trump could have a possessory interest in a critical subset of the seized materials—the classified records. Central to its finding was the court's refusal to accept the Government's sworn statements as to the status of those records. *See* DE.89:4 ("[T]he Government's position thus presupposes the content, designation, and associated

interests in materials under its control—yet, as the parties' competing filings reveal, there are disputes as to the proper designation of the seized materials, the legal implications flowing from those designations, and the intersecting bodies of law permeating those designations.").

However, the law is clear that classification is a determination committed solely to the Executive Branch. *See, e.g.*, *In re Search Warrant for the Pers. of John F. Gill*, 2014 WL 1331013, at *2 (E.D.N.C. Mar. 31, 2014) ("The determination of whether to classify information and the proper classification thereof is a matter committed solely to the Executive Branch. . . . A defendant cannot challenge this classification. A court cannot question it."). Notably, even former President Trump's own brief opposing the Government's request for a stay did not argue that the plaintiff could have a possessory interest in classified documents. And, while former President Trump has intermittently argued that he could have declassified records while in office, he failed to assert that he declassified any of the records at issue, much less substantiate those assertions. Thus, the district court concluded that a special master was needed to resolve a "dispute" about whether documents were classified, when no such dispute existed.

Furthermore, as the Eleventh Circuit panel that granted the Government's motion for a partial stay of the district court's September 5 order explained, the issue of declassification is ultimately a red herring: "[D]eclassifying an official

document would not change its content or render it personal. So even if we assumed that Plaintiff did declassify some or all of the documents, that would not explain why he has a personal interest in them." *Trump* v. *United States*, 2022 WL 4366684, at *8 (11th Cir. Sept. 21, 2022).

The district court's conclusion that former President Trump might nonetheless establish the necessary possessory interest in a classified document therefore relied on an untenable chain of conclusions: that the Government's representations as to the status of the classified materials might be overcome by unspecified and unsubstantiated assertions of declassification by a former official, and that a showing that a particular record no longer is, or never was, classified could establish former President Trump's possessory interest in that record. Former President Trump cannot have a possessory interest in classified records, and the mere fact that he disputed the proposition in a legal filing did not, and cannot, overcome the settled law establishing it.

B. The District Court Erred In Finding That Former President Trump Could Assert Executive Privilege In These Circumstances.

In appointing a special master and enjoining aspects of the criminal investigation, the district court improperly assumed that former President Trump could plausibly assert a claim of executive privilege against the Executive Branch in its execution of an ongoing criminal investigation. The court's assumption was

based on the observation that, although the Supreme Court has never upheld such an assertion, it has not yet explicitly foreclosed it as a matter of law. However, the court failed to confront, let alone distinguish, Supreme Court precedent clearly explaining why executive privilege cannot possibly be asserted in this manner.

Executive privilege stems from the need for confidentiality in communications and deliberations with the President in the exercise of executive functions. It perverts the very purpose of the privilege to contemplate its operation "against the very Executive Branch in whose name the privilege is invoked," *Nixon* v. *Adm'r of Gen. Serv.* ("*Nixon* v. *GSA*"), 433 U.S. 425, 447–48 (1977), let alone to frustrate the incumbent Executive Branch's performance of a core executive function—here, a criminal investigation into mishandling of classified information. No court in any other case has ever credited such a claim.

Nevertheless, the district court allowed for the possibility that executive privilege could be wielded in this contradictory manner on the basis that the Supreme Court had "not rule[d] out the possibility of a former President overcoming an incumbent President on executive privilege matters."[4] Having

[4] The district court also emphasized Justice Kavanaugh's statement on the denial of the application for a stay in *Trump* v. *Thompson*, 142 S. Ct. 680, 680 (2022), in which he noted that: "[t]he questions whether and in what circumstances a former President may obtain a court order preventing disclosure of privileged records from his tenure in office, in the face of a determination by the incumbent President to waive the privilege, are unprecedented and raise serious and substantial concerns." DE.64:17. But *Trump* v. *Thompson* involved a

concluded that former President Trump's novel executive privilege theory had not yet been explicitly rejected by the Supreme Court, the district court proceeded to ignore the abundance of caselaw militating against this approach. For example, *Nixon* v. *GSA*, the very case to which the court pointed as having "not rule[d] out the possibility of a former President overcoming an incumbent President on executive privilege matters," found that the opposing view of the incumbent President "detracts from the weight of" a former president's assertion of the privilege. 433 U.S. at 449.

The fact that the Supreme Court has not yet explicitly precluded a particular kind of executive privilege claim is not affirmative evidence that the claim has merit. The very purpose of the privilege—the need to protect the ability of the Executive Branch to perform its core functions—and the caselaw addressing the

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claim of executive privilege seeking to prevent disclosure of documents *to a separate branch of government*, in the context of a congressional investigation. Justice Kavanaugh's recognition of "unprecedented" and "serious" questions of privilege in that situation provides no support for the very different claim here in which executive privilege would be used to withhold information from the Executive Branch itself and to impede the performance of executive functions. And while it is conceivable that there could be circumstances in which a malign future president willfully rejects a claim of executive privilege by a former president in defiance of the interests for which the privilege exists, this case does not present such a hypothetical. Here, there is no plausible claim that the incumbent Executive Branch's rejection of the prior President's claims of privilege is indifferent or intended to, or would have the effect of, harming the national interest, or would deny future presidents the ability to invoke privilege as necessary to assure the confidentiality of their presidential deliberations and communications.

privilege demonstrate that former President Trump's attempt to assert it against the Executive Branch here has no basis whatsoever.

* * *

The district court's opinion credits former President Trump's flawed and unsupported arguments without meaningfully analyzing them. The relief that former President Trump received was extraordinary—including enjoining aspects of an ongoing criminal investigation—yet, the evidence and arguments he presented would fail to justify even much less intrusive relief. This stark disparity between the superficial and unsubstantiated grounds asserted and the extraordinary relief granted seriously undermines the appearance of fairness essential to the rule of law.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court should reverse the district court's order of September 5, 2022, with instructions to dismiss this action.

Dated: October 21, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the applicable type-volume limitation under Federal Rule of Appellate Procedure 32(a)(7). According to the word-processing software's word count, there are 4,323 words in the applicable sections of this brief. I also certify that this brief complies with the applicable type-style requirements under Federal Rules of Appellate Procedure 32(a)(5) and (6). The brief was prepared in 14-point, Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2022, a true and correct copy of the foregoing document was filed with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the attorneys of record who are registered participants in the Court's electronic notice and filing system.

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