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'S MOTION FOR A PARTIAL STAY PENDING APPEAL

Former federal and state government officials Donald B. Ayer, John B. Bellinger III, Gregory A. Brower, John J. Farmer Jr., Stuart M. Gerson, Peter D. Keisler, 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 the Government's motion for a partial stay of the district court's order pending appeal. In support of their motion, *Amici* state the following:

This Court has authority to appoint *amici curiae* 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 and state 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.

As the Court will be required to evaluate the merits of the parties' claims in order to decide the Government's motion for a partial stay pending appeal, *Amici* seek leave to submit their brief in order to provide their understanding of and experience with the legal issues central to the Court's inquiry into the Government's likelihood of success on the merits.

For the foregoing reasons, *Amici* respectfully request that this Court grant them leave to file the attached brief in support of the Government's motion for a partial stay pending appeal.

Dated: September 16, 2022

Respectfully submitted,

/s/ Jay B. Shapiro
Jay B. Shapiro
STEARNS WEAVER MILLER
WEISSLER ALHADEFF &
SITTERSON, P.A.
150 West Flagler St., Ste. 2200
Miami, FL 33130
Tel: (305) 789-3229
jshapiro@stearnsweaver.com

Norman L. Eisen
NORMAN EISEN PLLC
2000 Massachusetts Ave. NW
Washington, DC 20036
Tel: (202) 709-4945
nleisen@normaneisenllc.com

Fred Wertheimer
DEMOCRACY 21
2000 Massachusetts Ave. NW
Washington, DC 20036
Tel: (202) 355-9600
fwertheimer@democracy21.org

/s/ Brad S. Karp
Brad S. Karp
Roberto Finzi
Harris Fischman
David K. Kessler
Samantha C. Fry
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Ave. of the Americas
New York, NY 10019-6064
Tel: (212) 373-3000
bkarp@paulweiss.com
rfinzi@paulweiss.com
hfischman@paulweiss.com
dkessler@paulweiss.com
sfry@paulweiss.com

Counsel for Amici Curiae

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 1,081 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.

/s/ Jay B. Shapiro
Jay B. Shapiro

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 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.

/s/ Jay B. Shapiro
Jay B. Shapiro

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 and as Deputy General Counsel at the Federal Bureau of Investigation, as 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 as a member of the Nevada Legislature during five sessions, including as Chair of the Senate Judiciary Committee.

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).

Alan Charles Raul served as Associate Counsel to the President (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 (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.

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

[PROPOSED] BRIEF OF FORMER FEDERAL AND STATE GOVERNMENT OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT UNITED STATES OF AMERICA'S MOTION FOR A PARTIAL STAY PENDING APPEAL

Jay B. Shapiro
STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.
150 West Flagler St., Ste. 2200
Miami, FL 33130
Tel: (305) 789-3229
jshapiro@stearnsweaver.com

Norman L. Eisen
NORMAN EISEN PLLC
2000 Massachusetts Ave. NW
Washington, DC 20036
Tel: (202) 709-4945
nleisen@normaneisenllc.com

Fred Wertheimer
DEMOCRACY 21
2000 Massachusetts Ave. NW
Washington, DC 20036
Tel: (202) 355-9600
fwertheimer@democracy21.org

Brad S. Karp
Roberto Finzi
Harris Fischman
David K. Kessler
Samantha C. Fry
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Ave. of the Americas
New York, NY 10019-6064
Tel: (212) 373-3000
bkarp@paulweiss.com
rfinzi@paulweiss.com
hfischman@paulweiss.com
dkessler@paulweiss.com
sfry@paulweiss.com

Counsel for Amici Curiae

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 and state 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)

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.

Karp, Brad S.

Keisler, Peter D.

Kessler, David K.

Kise, Christopher M.

Knopf, Andrew Franklin

Lacosta, Anthony W.

LoCicero, Carol Jean

McElroy, Dana Jane

Minchin, Eugene Branch

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

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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(Continued)

Page(s)

Statutes

Other Authorities

INTEREST AND IDENTITY OF *AMICI CURIAE*[1]

Amici former federal and state government officials Donald B. Ayer, John B. Bellinger III, Gregory A. Brower, John J. Farmer Jr., Stuart M. Gerson, Peter D. Keisler, 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 cases involving sensitive or classified materials 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 law, *Amici* maintain an active interest in the proper resolution of the important questions raised by the Government's motion.

---

[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).

STATEMENT OF THE ISSUES

The issue is whether the Government is entitled to a partial stay of the district court's order to the extent that the order: (1) enjoins further review and use for criminal investigative purposes of approximately 100 classified records; and (2) requires the Government to disclose those classified records to a special master.

SUMMARY OF THE ARGUMENT

Amici respectfully submit this brief in support of the Government's motion for a partial stay. The motion should be granted.

First, the district court erred in holding that former President Trump could under any circumstances prevail on a motion under Federal Rule of Criminal Procedure 41(g) ("Rule 41(g)") as to the approximately 100 documents that are at issue in this appeal. Those documents are all classified and, in some cases, may qualify as Presidential records, which are both by definition property of the U.S. government such that former President Trump does not have (and cannot have) the possessory interest in them required to prevail on a motion under Rule 41(g).

Second, the appointment of a special master was clearly improper at least insofar as the special master was empowered to decide claims of executive privilege. Executive privilege simply cannot be asserted—as the former President proposes to do here—against "the very Executive Branch in whose name the privilege is invoked." *Nixon* v. *Adm'r of Gen. Serv.*, 433 U.S. 425, 447–48 (1977)

("*Nixon* v. *GSA*"). That is particularly true here, where the Executive Branch has sought the return of its own classified records in connection with its ongoing performance of core executive and national security functions. Further, and again by definition, any records that are subject to executive privilege will be Presidential records belonging to the U.S. government, not to former President Trump.

Third, a former President is entitled to no greater protection under the law than is any other citizen. To the extent that the district court held otherwise, concern for reputational harm is not a valid basis for enjoining a criminal investigation, especially one that is inexorably intertwined with a national security damage assessment. Nor is there a principled basis for applying a different rule to this plaintiff, by virtue of the "position formerly held by" him, ECF No. 89 at 10,[2] effectively endowing him with greater procedural rights than those afforded to other citizens.

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

[2] Citations refer to the docket in *Trump* v. *United States*, No. 22-cv-81294 (S.D. Fla.).

subpoena seeking classified documents, the Government executed a warrant to search Mar-a-Lago on August 8, 2022. ECF No. 48 at 7–8. 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 appoint a special master to, among other things, review all of the materials seized from Mar-a-Lago. *See* ECF No. 1 at 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. ECF No. 64. The Government 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." ECF No. 69 at 1. Although the Government registered its disagreement with the order "as to a much broader set of seized materials," its motion focused narrowly on the approximately 100 classified documents. *Id.* at 1–2. The Government stated that, if the district court did not

grant the stay by September 15, the Government would seek relief from this Court. *Id.* Former President Trump opposed the motion. ECF No. 84.

On September 15, the district court appointed a special master and issued a short order denying the Government's motion for a partial stay. ECF No. 89. The following day, the Government moved in this Court for a partial stay pending appeal.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE FORMER PRESIDENT COULD PREVAIL ON A RULE 41(g) MOTION AS TO CLASSIFIED INFORMATION OR PRESIDENTIAL RECORDS OVER WHICH HE HAS NO POSSESSORY INTEREST.

The district court erred in refusing to grant the partial stay sought by the Government because former President Trump cannot, as a matter of law, prevail on the underlying motion for return of property under Federal Rule of Criminal Procedure 41(g) as to the approximately 100 documents at issue in this appeal. As applicable here, Rule 41(g) allows a party to seek the return of only seized property in which he or she has a "possessory interest." *See United States* v. *Garcon*, 406 Fed. App'x 366, 369 (11th Cir. 2010) (unpublished); *United States* v. *Pierre*, 484 F.3d 75, 87 (1st Cir. 2007) ("[A] Rule 41(g) motion is properly denied 'if the defendant is not entitled to lawful possession of the seized property.'") (quoting *United States* v. *Mills*, 991 F.2d 609, 612 (9th Cir. 1993)). Here, former President

Trump does not and cannot have a possessory interest in any classified information or Presidential records, and any Rule 41(g) motion, at least with respect to the 100 documents, must fail as a matter of law.

First, former President Trump has no right to possess the 100 or so classified records at issue here because no private citizen has a "possessory interest" in the U.S. government's classified records. To the contrary, "[i]t is well-established that classified information is the property of the United States, and individuals do not have a right to such material." *United States* v. *Montgomery*, 2021 WL 615401, at *5 (S.D. Ohio Feb. 17, 2021); *accord, 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) ("*Gill*") (same). This proposition is not controversial; even former President Trump's own brief opposing the Government's request for a stay did not argue he has a possessory interest in classified documents.[3]

Because former President Trump has no possessory interest in the approximately 100 classified documents, neither the special master (nor the district court) has the legal authority to return them to him under Rule 41(g). As to these records, any Rule 41(g) motion must be denied. *See United States* v. *Hoffman*,

[3] The former President has not suggested that he has the requisite security clearance and "need to know," or that he has followed the statutorily prescribed process for even viewing these documents, let alone possessing them. *See* ECF No. 69 at 18 (providing requirements to review classified materials); *see also* Exec. Order 13526 § 4.4 (Dec. 29, 2009).

2018 WL 5973763, at *2 (E.D. Va. Nov. 14, 2018) (denying Rule 41(g) motion as to property containing classified information in part because "Petitioner 'lack[s] entitlement to lawful possession' of such seized property due to its classified nature"); *Gill*, 2014 WL 1331013, at *2 (denying motion for return of iPhone containing classified material because "[c]lassified information is the property of the United States and individuals do not have a property right to such material").

The district court's order does not grapple with the law. Instead, it simply asserts that there is a "dispute" about whether the records are actually classified and whether the former President has a possessory interest in classified records.[4] ECF No. 89 at 4–5. As to the latter, the district court cited no authority or analysis for its apparent conclusion that a private citizen might actually have a possessory interest in classified records. And there is none. That error alone warrants reversal, and justifies a stay now.

[4] Even after recognizing that a movant under Rule 41(g) must allege "a colorable ownership, possessory or security interest" in the property at issue, the court refused to engage with caselaw that clearly forecloses any argument that President Trump has a possessory interest in any of the classified materials. ECF No. 89 at 4–5. Rather, the court justified its refusal to evaluate the parties' arguments on the merits on the fact that the parties disputed some of the issues. But there is no contested legal or factual issue that casts doubt on the merits of the former President's motion, at least as to the 100 documents that are the subject of this appeal. It is the court's most fundamental responsibility to resolve the parties' disputes based on the applicable legal principles. That responsibility cannot be avoided (or delayed) through the appointment of a special master where precedent does not otherwise permit that appointment.

Moreover, the district court suggested that it need not "accept the Government's conclusions" that these materials are classified. *Id.* at 3–4. But the law is clear that the court lacks the authority to challenge whether material is properly classified; that determination is for the Executive Branch alone.[5] *See Gill*, 2014 WL 1331013, at *2 ("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.") (internal quotations and citations omitted); *Roark* v. *United States*, 2015 WL 2085193, at *3 (D. Or. May 4, 2015) (declining to engage in further judicial review of classified documents at issue in Rule 41(g) motion where government submitted declaration of NSA expert stating that the documents were classified).[6] We agree with the district court that an "evenhanded procedure does

[5] The district court's approach to classified material is unprecedented for the additional reason that the court has ordered the Government to make the classified materials available for inspection by former President Trump's counsel. ECF No. 91 at 3–4. We are unaware of any case in which a federal court has ordered the Government to provide documents classified as Top Secret to defense counsel (regardless of whether counsel has the requisite clearance) in a pre-indictment context, let alone for the purpose of resolving a purported "dispute" about whether the materials are actually classified or subject to Executive Privilege.

[6] Nor was there a legitimate dispute about whether some of these classified records had been declassified. To be sure, the former President's filings implied, without having to commit, that some *could* have been declassified. *See* ECF No. 1 at 13 ("[T]here are public statements . . . indicating the documents sought in this search had been declassified"); ECF No. 84 at 11–12 (arguing that a president has the power to declassify documents). But these carefully

not demand unquestioning trust in the determinations of the Department of Justice" in all things; but such a procedure does require the district court to follow the law.

Second, the district court's order also ignored the clear law that former President Trump cannot claim a possessory interest in the approximately 100 classified documents by calling them Presidential records. The Presidential Records Act ("PRA") clearly states that all Presidential records are the property of the U.S. government: "The United States shall reserve and retain complete ownership, possession, and control of Presidential records." 44 U.S.C. § 2202; *see Cook* v. *Nat'l Archives & Records Admin.*, 758 F.3d 168, 171 (2d Cir. 2014) ("In passing the [PRA], Congress made presidential . . . records the property of the United States, ending the historic practice of presidents taking ownership of records created during their administrations."). It is uncontroverted that, as a matter of law, the former President does not have a possessory interest in these records. *See Am. Histor. Ass'n* v. *Nat'l Archives and Rec. Admin.*, 516 F. Supp. 2d 90, 93 (D.D.C. 2007) ("[P]residential records are not personal property.").

---

crafted statements that avoid taking a position on the issue do not create a "dispute." If the former President's counsel had believed there was a good faith basis for stating that the records had been declassified, they would have done so. They did not. Instead, they urged this Court to ensure that any special master had a security clearance. *See* Sept. 1, 2022 Hr'g Tr. 56:18–21 (suggesting that security clearance could be expedited for any special master candidates without clearance).

Even former President Trump conceded that he has no possessory interest in the records at issue here. Instead, he argued that, under the PRA, "a former President has an unfettered right of access to his Presidential records even though he may not 'own' them." ECF No. 84 at 13. Even if that were accurate, it would not permit the return of property that belongs to the United States to a private citizen. Indeed, the former President himself has stated that Presidential records should be returned to the U.S. government. *See* ECF No. 84 at 3–4 ("What is clear regarding all of the seized materials is that they belong with either [former] President Trump (as his personal property to be returned pursuant to Rule 41(g)) or with NARA.").

The district court did not address any of this well-established law, or the former President's concession. In fact, the district court's order denying the Government's motion for a partial stay does not even contain the words "Presidential records" or a citation to the PRA. Instead, the court referred vaguely to "important and disputed issues" related to privilege that needed to be resolved by a special master. ECF No. 89 at 4. But the issue as to whether a former President has a possessory interest in Presidential records was "disputed" only to the extent the former President refused to concede the legally obvious, not because there is actually a legitimate legal dispute to be had. It was legal error for the

district court to conclude that it was possible for the former President to succeed in establishing a possessory interest in Presidential records.

In sum, all classified information and Presidential records at issue on appeal are the property of the U.S. government as a matter of law, and former President Trump does not have (and cannot have) a possessory interest in them. Any Rule 41(g) motion as to these materials must therefore fail as a matter of law. As such, and at least with respect to these records, there is nothing for the special master to do. It was error to deny the Government's motion for a partial stay.

II. THE APPOINTMENT OF THE SPECIAL MASTER WAS IMPROPER AS TO ASSERTIONS OF EXECUTIVE PRIVILEGE.

A. Executive Privilege Cannot Be Asserted to Shield Classified Documents from the Executive Branch in its Performance of Executive Functions.

Executive privilege cannot be invoked by a former president to prevent the Executive Branch from using its own classified information in the performance of executive functions. Nonetheless, in this case the district court appointed a special master to "resolve" the former President's assertions of executive privilege against the Executive Branch. Because any such assertions must fail as a matter of law, the appointment of a special master to review those assertions was legal error. This error is most egregious in regard to the 100 or so classified documents.

Executive privilege is the power of the President and others within the Executive Branch to withhold certain documents and information from otherwise

lawful requests by the courts and Congress. That privilege is based on the need for confidentiality in communications and deliberations with the President in the exercise of executive functions.[7] To allow a former president to assert executive privilege here would turn the privilege on its head by impeding the effective operation of the Executive, and it would be an especially bizarre perversion of the privilege to allow a former president to use it to thwart a core executive function like a criminal investigation into mishandling of classified information. *See Gill*, 2014 WL 1331013, at *2; *see also United States* v. *Nixon*, 418 U.S. 683, 712 (1974) ("*Nixon*") (rejecting concern that presidential advisors would "temper" their remarks out of fear of disclosure in a potential criminal prosecution).

The district court's order denying the Government's request for a partial stay does not confront this issue. Instead, the court (without saying so explicitly) seems to rely on its own observation, made in ordering the appointment of a special

[7] Executive privilege does not shield all documents created within the Executive Branch from disclosure: "The presidential communications privilege protects 'documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential.' . . . as its name suggests, this privilege is narrow with respect to *whose* documents it protects. Materials are covered only if they were 'authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." *Protect Democracy Project, Inc.* v. *U.S. Dept. of Def.*, 320 F. Supp. 3d 162, 172–73 (D.D.C. 2018) (quoting *In re Sealed Case*, 121 F.3d 729, 746, 752 (D.C. Cir. 1997)).

master, that (1) the Supreme Court's ruling in *Nixon* v. *GSA* "did not rule out the possibility of a former President overcoming an incumbent President on executive privilege matters," and (2) the Supreme Court's recognition in *Trump* v. *Thompson*, 142 S. Ct. 680, 680 (2022) (Kavanaugh, J.), in the context of a demand for records from Congress, 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." ECF No. 64 at 17 (emphasis added).

As an initial matter, that the former President's theory is *not entirely foreclosed* is hardly sufficient to establish a strong likelihood of success on the merits. *See Greene* v. *Raffensperger*, 2022 WL 1136729, at *1, 28 (N.D. Ga. 2022) (finding Plaintiff failed to carry burden of establishing a strong likelihood of success on the merits where the "case raise[d] novel and complex constitutional issues of public interest and import" and "unsettled questions of law").

Moreover, the district court's observation ignores the essential question presented here: whether a former President can assert executive privilege to shield classified documents from the Executive Branch for use in an ongoing criminal and national security investigation. The answer is clearly "no." No court has ever

ruled to the contrary, and nothing in *Nixon* v. *GSA* or *Trump* v. *Thompson* suggests otherwise.[8]

To the contrary, the Court in *Nixon* v. *GSA* recognized 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 ("[I]t must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly."). The executive privilege exists, "not for the benefit of the President as an individual, but for the benefit of the Republic." *Id.*

The district court's order appointing a special master also cited Justice Kavanaugh's statement on the denial of the application for a stay in *Trump* v. *Thompson*. But Justice Kavanaugh's suggestion that a former president might successfully invoke executive privilege against the incumbent's opposing view was made in the context of a disclosure in a *congressional* investigation that sought

[8] Former President Trump has not clarified what type of executive privilege he is relying on in these proceedings, nor has he specified the documents over which he is asserting privilege. The parties and district court have proceeded on the assumption that he is asserting the presidential communications privilege, which is the type of executive privilege at issue in *Nixon* v. *GSA* and in *Trump* v. *Thompson*, because the "state secrets" privilege does not extend to a former president *in any context*. *See Nixon* v. *GSA*, 433 U.S. at 440 (parties agreeing that "the very specific privilege protecting against disclosure of state secrets and sensitive information concerning military or diplomatic matters . . . may be asserted only by an incumbent President").

records arguably subject to executive privilege, including, among other things, diaries, the former Chief of Staff's notes, and a draft executive order. The disclosure to one branch of government of materials subject to another branch's privileges raises complex questions that have no bearing on this case, where the former President seeks to assert the privilege to frustrate the Executive Branch's carrying out of its own responsibilities, including by preventing the Executive Branch from accessing classified documents that belong to the U.S. government. *See Nixon*, 418 U.S. at 708 ("[Executive privilege] is inextricably rooted in the separation of powers under the Constitution."). The Government is not at this point seeking to disclose these materials publicly, in court, or even under the grand jury's strict secrecy rules. Even if the former President had a valid executive privilege claim, he would have appropriate occasions to assert that claim without crippling an ongoing criminal investigation.[9]

Because executive privilege cannot as a matter of law be asserted to withhold the classified documents from the Executive Branch in the exercise of an executive function, there simply is no role in these proceedings, at least with

[9] It is also noteworthy that former President Trump failed to assert executive privilege in response to the Government's grand-jury subpoena seeking "[a]ny and all documents or writings" in his custody or control "bearing classification markings." ECF No. 48 at 8. Instead, his counsel produced a limited set of documents and certified that all responsive documents had been produced. *Id.* at 8–9.

respect to the documents at issue, for a special master to make determinations as to executive privilege.

B. Any Records Subject to Executive Privilege Will, By Definition, Be Presidential Records Belonging to the United States, and Not the Former President.

It is well-accepted that any record subject to executive privilege is, by definition, a Presidential record. *See* 44 U.S.C. § 2201(2) ("Presidential records" are materials "created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the [President's] constitutional, statutory, or other official or ceremonial duties."). As shown in Section I, Presidential records belong to the U.S. government, not former President Trump. Thus, because none of the materials over which former President Trump asserts executive privilege belong to him, a special master review of the 100 or so seized classified documents cannot result in the "return" of any such documents subject to executive privilege to former President Trump. A special master review of such materials would be a pointless endeavor.

* * *

In short, the district court declined to address in any meaningful way the Government's argument that the former President has no colorable claim of

executive privilege in this case. Instead, without making any finding that former President Trump's assertion of executive privilege against the current Executive Branch has a strong likelihood of success on the merits, the district court—in its initial order and again in its subsequent order denying the Government's motion for a partial stay pending appeal—declined to assess at all whether a likely successful claim of executive privilege exists, instead enjoining the Government and essentially leaving it to the special master to sort out.[10] In so doing, the district court not only put the cart before the horse, it essentially abdicated its responsibility to make any finding of a strong likelihood of success on the merits on this critical issue. But that was a determination that the district court: (1) was required to make *before* it could grant the extraordinary equitable relief of enjoining a criminal investigation; and (2) should also have made in connection with its ruling on the Government's motion for a partial stay pending appeal.

As a result, the record before this Court is that the Executive Branch has been enjoined from exercising one of its most critical core functions—an investigation into the possible criminal misuse of highly classified documents—on

[10] *See* ECF No. 89 at 3–4 (in response to the Government's argument that "that Plaintiff has no plausible claim of privilege" to highly classified documents, "[t]he Court does not find it appropriate to accept the Government's conclusions on these important and disputed issues without further review by a neutral third party"); ECF No. 91 at 2 (directing special master to conduct privilege review and make recommendations in connection with disputed assertions of executive privilege).

the basis of a belief by the district court that a former elected official may, *at best*, have a theoretical chance of prevailing on a claim of executive privilege that, to our knowledge, has never been accepted by any court in the country.

III. A FORMER PRESIDENT IS ENTITLED TO NO GREATER PROTECTION UNDER THE LAW THAN ANY OTHER CITIZEN.

The district court also erred by repeatedly affording greater protection to the plaintiff because he is a former president. As an initial matter, the district court's original analysis of whether it had jurisdiction over the former President's Rule 41(g) motion relied heavily on the purported "irreparable injury" from the "threat" that the former President would be subject to "future prosecution" based on the seized records. ECF No. 64 at 10. In that order appointing a special master, the district court held: "[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. A future indictment . . . would result in reputational harm of a decidedly different order of magnitude." *Id*.

But the law is clear that, as a general matter, the collateral consequences of a potential 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).

For this reason, courts cannot and do not enjoin criminal prosecutions based on the potential collateral consequences of a possible charge and conviction.

Courts have long held that *Younger*'s analysis applies equally to injunctions based on the risk of damage to a defendant's reputation, finding that reputational harm does not constitute irreparable injury that warrants court intervention. *See Deaver* v. *Seymour*, 822 F.2d 66, 69 (D.C. Cir. 1987) (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"); *United States* v. *Stone*, 394 F. Supp. 3d 1, 16 (D.D.C. 2019) ("the Supreme Court has expressly rejected the contention that [damage to a defendant's reputation] warrants federal intervention"); *Manafort* v. *U. S. Dep't of Just.*, 311 F. Supp. 3d 22, 31 (D.D.C. 2018) (denying injunctive relief "based on a concern that [defendant] may suffer reputational harm or be forced to expend resources in his own defense"); *Matter of Search of 4801 Fyler Ave.*, 879 F.2d 385, 389 (8th Cir. 1989) (same). And even if hypothetical reputational harm were a legally cognizable interest, it certainly would not supersede the national security interests at stake in regard to these classified documents and justify enjoining a criminal investigation.

The requirement of more than mere reputational harm to establish irreparable injury is a sound one. Every person investigated by the government, or

even subject to a search warrant, faces the risk of prosecution, and therefore a risk of reputational harm. Granting injunctive relief based on that risk would allow all potential defendants to seek special masters, "encourag[ing] a flood of disruptive civil litigation" allowing prospective defendants to, through "ancillary equitable proceedings, circumvent federal criminal procedure." *Deaver*, 822 F.2d at 71.

The district court repeated its error of privileging the former President when it denied the Government's motion for a stay. In a final section called "Relevant Principles," the court asserted that "the principles of equity require" it to consider "the position formerly held by Plaintiff." ECF No. 89 at 9–10. The court did not explain what that statement meant, but whatever the court intended to imply, the assertion is wrong.

"Principles of equity" require that citizens be treated equally under the law. The district court's analysis, which gave greater weight to the reputation of a former President than to the reputation of any other citizen, and greater weight to that personal reputation than to national security concerns, is fundamentally inconsistent with the basic tenets of U.S. law. Under the court's reasoning, its analysis would be different if the plaintiff were not the former President but a school teacher, police officer, or veteran who had taken classified information from a U.S. government facility and stored it in their home.

There is no basis for that distinction, and no principled reason for applying a different rule to former presidents and endowing them with rights greater than afforded to other citizens. To do so would only undermine the "appearance of fairness and integrity" that the court sought to protect in its order, ECF No. 89 at 10, and belie the fundamental principle that "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." *United States* v. *Lee*, 106 U.S. 196, 220 (1882).

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court should grant the Government's motion for a partial stay.

Dated: September 16, 2022

Respectfully submitted,

/s/ Jay B. Shapiro
Jay B. Shapiro
STEARNS WEAVER MILLER
WEISSLER ALHADEFF &
SITTERSON, P.A.
150 West Flagler St., Ste. 2200
Miami, FL 33130
Tel: (305) 789-3229
jshapiro@stearnsweaver.com

Norman L. Eisen
NORMAN EISEN PLLC
2000 Massachusetts Ave. NW
Washington, DC 20036
Tel: (202) 709-4945
nleisen@normaneisenllc.com

Fred Wertheimer
DEMOCRACY 21
2000 Massachusetts Ave. NW
Washington, DC 20036
Tel: (202) 355-9600
fwertheimer@democracy21.org

/s/ Brad S. Karp
Brad S. Karp
Roberto Finzi
Harris Fischman
David K. Kessler
Samantha C. Fry
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Ave. of the Americas
New York, NY 10019-6064
Tel: (212) 373-3000
bkarp@paulweiss.com
rfinzi@paulweiss.com
hfischman@paulweiss.com
dkessler@paulweiss.com
sfry@paulweiss.com

Counsel for Amici Curiae

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 5,203 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.

/s/ Jay B. Shapiro
Jay B. Shapiro

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 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.

/s/ Jay B. Shapiro
Jay B. Shapiro