No. 21-932

In the Supreme Court of the United States

DONALD J. TRUMP, FORMER PRESIDENT OF THE UNITED STATES, PETITIONER

v.

BENNIE G. THOMPSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE UNITED STATES HOUSE SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE UNITED STATES CAPITOL, ET AL.

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

BRIEF FOR THE EXECUTIVE BRANCH RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the denial of a preliminary injunction that would have barred the Executive Branch from disclosing certain Executive Branch records to Congress as authorized under the Presidential Records Act of 1978, 44 U.S.C. 2201 *et seq.*, where the President has determined that disclosure of those records would further Congress's legitimate legislative purposes and serve the national interest.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Miscellaneous: Page

Miscellaneous—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-77a) is not yet published in the Federal Reporter but is available at 2021 WL 5832713. The opinion of the district court (Pet. App. 78a-126a) is not yet published in the Federal Supplement but is available at 2021 WL 5218398.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2021. The petition for a writ of certiorari was filed on December 23, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondents United States House Select Committee to Investigate the January 6th Attack on the United States Capitol and the chairperson of that committee, Bennie G. Thompson (collectively, the Committee) sought certain presidential records created during the Administration of petitioner Donald J. Trump that are in the custody of the National Archives and Records Administration (NARA) and the Archivist of the United States (collectively, the Archivist). The Archivist is identifying responsive records on a rolling basis, and the Executive Branch is engaged in a negotiated accommodation process that has led the Committee to withdraw or defer its request as to certain records, including some that implicate particular Executive Branch interests. But President Biden has declined to assert executive privilege over other documents in the initial tranches and directed the Archivist to produce them to the Committee.

Petitioner filed suit in the United States District Court for the District of Columbia, seeking to prohibit the Archivist from making certain requested records available to the Committee on the ground that those records were privileged. The district court denied a preliminary injunction. Pet. App. 78a-126a. The court of appeals affirmed. *Id.* at 1a-77a. In doing so, the court emphasized that its decision addresses only the disputed records from the first three tranches and that any "potential future claims" related to other documents are neither "ripe for constitutional adjudication" nor "capable of supporting [a] preliminary injunction." *Id.* at 20a.

A. The Presidential Records Act

The Presidential Records Act of 1978 (PRA or Act), 44 U.S.C. 2201 *et seq.*, establishes a framework for

preserving, retaining, and accessing presidential records. The Act expressly provides that the United States—not the President—has "complete ownership" of those records, and further provides that upon the completion of a President's final term in office, "the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President." 44 U.S.C. 2202, 2203(g)(1).

Although the PRA generally requires the Archivist to provide public access to presidential records within five years, an outgoing President may restrict access to certain categories of records for up to 12 years after the end of the President's final term. 44 U.S.C. 2203(g)(1), 2204(a) and (b)(2). Even during the period of restricted access, however, presidential records in those categories must be made available in certain circumstances. 44 U.S.C. 2205. As relevant here, the Archivist shall make otherwise "restricted" presidential records available on request "to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available," "subject to any rights, defenses, or privileges which the United States or any agency or person may invoke." 44 U.S.C. 2205(2)(C).

Implementing regulations and an Executive Order issued in 2009 specify that, upon receipt of such a request, the Archivist must provide written notice to the incumbent President and the former President of his intent to disclose records, in sufficient detail to allow any appropriate assertion of executive privilege. 36 C.F.R. 1270.44(c); see Exec. Order No. 13,489, § 2, 3 C.F.R.

191, 192 (2009 comp.). If the Archivist does not receive notice of an assertion of executive privilege within 30 days, he will release them to Congress. *Ibid.*

If a former President asserts a claim of executive privilege, the Archivist must consult with the incumbent President "to determine whether the incumbent President will uphold the claim." 36 C.F.R. 1270.44(f)(1). If the incumbent President does not uphold the claim or does not make a determination within the allotted time, the regulations direct the Archivist to disclose the records to Congress unless a court directs the Archivist to withhold them. See 36 C.F.R. 1270.44(f)(3); see also Exec. Order No. 13,489, § 4(b) (providing that "the Archivist shall abide by any instructions given him by the incumbent President or his designee unless otherwise directed by a final court order"). If the sitting President upholds the former President's assertion of privilege, the Archivist may not release the records absent a court order. 36 C.F.R. 1270.44(f)(2). The PRA provides the United States District Court for the District of Columbia with jurisdiction over any action brought by a former President challenging the Archivist's decision to release the documents notwithstanding his privilege claim. 44 U.S.C. 2204(e).

B. The January 6 Attack And The Committee's Investigation

1. On January 6, 2021, Congress convened a Joint Session to certify the results of the Electoral College vote in the 2020 Presidential Election. Pet. App. 6a. That morning, supporters of then-President Trump attended a rally on The Ellipse, just south of the White House. *Id.* at 6a-7a. During his remarks at the rally, President Trump asserted that the election had been "stolen" and urged the audience to "walk down * * * to the Capitol" to "demand that Congress do the right

thing and only count the electors that have been lawfully slated." *Ibid.* (citation omitted). Petitioner further urged the audience to "fight like hell" because "you'll never take back our country with weakness." *Ibid.* (citation omitted).

Shortly after petitioner's remarks, as the Joint Session of Congress began its work, a large crowd—which included individuals "armed with weapons and wearing full tactical gear"—amassed outside the Capitol. Pet. App. 7a; Staff Rep. of Senate Comm. on Homeland Sec. & Governmental Affairs & Senate Comm. on Rules & Admin., 117th Cong., 1st Sess., *Examining the U.S. Capitol Attack: A Review of the Security, Planning, and Response Failures on January 6*, at 23, 28-29 (June 8, 2021) (HSGAC Report). The crowd "overwhelmed law enforcement and scaled walls, smashed through barricades, and shattered windows to gain access to the interior of the Capitol." Pet. App. 7a. "As rioters poured into the building, members of the House and Senate, as well as Vice President Pence, were hurriedly evacuated from the House and Senate Chambers." *Id.* at 8a. Rioters subsequently "breached the Senate chamber," and "[i]n the House chamber, Capitol Police officers 'barricaded the door with furniture and drew their weapons to hold off rioters.'" *Ibid.*

Those events "marked the most significant breach of the Capitol in over 200 years." HSGAC Report 21. The attack "resulted in multiple deaths, physical harm to over 140 members of law enforcement, and terror and trauma among [congressional] staff, institutional employees, press and Members." H.R. Res. 503, 117th Cong., 1st Sess. 1 (2021) (Resolution 503). The riot also damaged or destroyed elements of the Capitol Building's infrastructure and "precious artwork," leaving

broken glass, blood, and even feces throughout the building. Pet. App. 9a (citation omitted).

2. In June 2021, the House voted to establish the Committee to, *inter alia*, "investigate and report upon the facts, circumstances, and causes" of the January 6 attack. Resolution 503, § 3(1). To that end, Resolution 503 authorizes the Committee to inquire into a range of matters relevant to the events of January 6, including "influencing factors that contributed" to the attack, § 4(a)(1)(B), and the federal government's "structure, coordination, operational plans, policies, and procedures, * * * particularly with respect to detecting, preventing, preparing for, and responding to" the attack. § 4(a)(2)(B). The Committee is tasked with producing a report identifying "changes in law, policy, procedures, rules, or regulations that could be taken" to "prevent future acts of violence * * * targeted at American democratic institutions," "improve the security posture of the United States Capitol Complex," and "strengthen the security and resilience of the United States and American democratic institutions." § 4(c); see § 4(a)(3).

3. On August 25, 2021, the Committee submitted a request to the Archivist for access to presidential records it believes are relevant to its investigation. Pet. App. 11a; see C.A. App. 33-44. The Archivist is identifying records responsive to the Committee's request on a rolling basis. On August 30, 2021, the Archivist notified petitioner of his intent to provide the Committee with access to the first tranche of records, which comprises 136 pages, seven of which were withdrawn as non-responsive upon further review. Pet. App. 12a.

On October 8, 2021, President Biden, through the Counsel to the President, informed the Archivist that he had determined that "an assertion of executive

privilege is not in the best interests of the United States, and therefore is not justified as to any of the documents" in the first tranche. Pet. App. 12a. In the President's judgment, given the "extraordinary events" that occurred on January 6, Congress had a "compelling need in service of its legislative functions" to understand the circumstances that led to the events of that day in order "to ensure nothing similar ever happens again." *Id.* at 12a-13a. The President "specified that his decision 'applied solely' to the documents in the first tranche." *Id.* at 14a (brackets and citation omitted).

Petitioner informed the Archivist that he was asserting executive privilege over 46 pages of the records in the first tranche. Pet. App. 12a. President Biden declined to uphold petitioner's assertion of privilege, citing his earlier determination that "an assertion of executive privilege is not in the best interests of the United States, and therefore is not justified." C.A. App. 160; see Pet. App. 13a. President Biden therefore instructed the Archivist to provide the records in the first tranche that petitioner identified as privileged to the Committee 30 days after informing petitioner of the pending disclosure. Pet. App. 14a.

In September, the Archivist notified President Biden and petitioner that he had identified two additional tranches of responsive records, totaling 888 pages. Pet. App. 14a-16a. Following negotiations with the Executive Branch, the Committee agreed to defer its request for 50 pages of those records related to the exercise of exclusive presidential authorities. *Id.* at 16a; see Letter from Jonathan C. Su, Deputy White House Counsel, to Kristin L. Amerling, Chief Counsel, the Committee (Dec. 16, 2021) (Su Letter), https://go.usa.gov/xt3ba. Another three pages were withdrawn after

NARA determined they were not presidential records. Pet. App. 14a. At the conclusion of the review period, petitioner asserted executive privilege over 724 of the remaining pages in the two tranches, and President Biden again declined to uphold the privilege assertion, citing the same reasons he had given as to the first tranche. *Id.* at 14a-16a. The President instructed the Archivist to grant the Committee access to those records 30 days after notifying petitioner of the pending disclosure. *Id.* at 16a.

4. Although this preliminary injunction appeal concerns only the records from those first three tranches, review of other records remains ongoing. See NARA, *Records Related to the Request for Presidential Records by the House Select Committee to Investigate the January 6th Attack on the United States Capitol*, https://www.archives.gov/foia/january-6-committee (providing relevant correspondence, including the letters cited below).

In October, the Archivist notified President Biden and petitioner that he had identified another set of responsive records, including 40 pages from the Office of Records Management and 511 pages from the National Security Council (NSC). See Letter from Dana A. Remus, White House Counsel, to David Ferriero, Archivist of the United States 1 (Dec. 17, 2021). On November 15, petitioner asserted privilege over six pages from the Office of Records Management, and President Biden declined to uphold that assertion. *Ibid.* As to the documents originating from the NSC, the Counsel to the President informed the Archivist that the Executive Branch had reached an agreement with the Committee to defer or withdraw its request for the vast majority of the records. *Ibid.* Among other things, that

accommodation reflected the Executive Branch's "longstanding and important interests in maintaining the confidentiality" of "the NSC's deliberative process." Su Letter 2.

At the conclusion of the review period (which was extended to facilitate additional consideration), petitioner asserted executive privilege over 17 pages of the remaining NSC records. See Letter from Donald J. Trump to David S. Ferriero, Archivist of the United States 1 (Dec. 22, 2021). President Biden again declined to uphold the assertion and directed the Archivist to produce the records to the Committee 30 days after providing notice to petitioner. See Letter from Dana A. Remus, White House Counsel, to David Ferriero, Archivist of the United States 1 (Dec. 23, 2021).

C. Proceedings Below

1. On October 18, 2021, petitioner filed this suit "solely in his official capacity as a former President," seeking declaratory and injunctive relief that would prevent the Archivist from providing access to any presidential records that are or may be privileged. Compl. ¶ 20; see Compl. 25-26. Petitioner also filed a motion for a preliminary injunction.

The district court denied the motion on November 9, 2021. Pet. App. 78a-126a. The court concluded that petitioner was unlikely to prevail on his claim that executive privilege bars the Archivist from providing the Committee with access to the documents at issue. *Id.* at 92a-103a. The court also determined that petitioner was not likely to succeed in establishing that the Committee acted beyond its legal authority in requesting the records. *Id.* at 105a-122a. Finally, the court held that petitioner had failed to establish that production of the records would cause irreparable harm, and that the

balance of the equities and the public interest weighed against an injunction. *Id.* at 122a-125a.

2. Petitioner appealed, and the court of appeals granted his request for an administrative injunction barring disclosure of the records at issue while that court considered his appeal. See Pet. App. 19a. The court also ordered expedited briefing and argument. See *id.* at 1a, 19a.

On December 9, 2021, the court of appeals affirmed the denial of a preliminary injunction. Pet. App. 1a-77a. The court observed that, "[w]hile the underlying lawsuit challenges the full span of the January 6th Committee's request for presidential records, this preliminary injunction appeal involves the narrower question of whether [petitioner's] assertion of executive privilege as to a subset of documents in the Archivist's first three tranches requires that those documents be withheld from the Committee." *Id.* at 20a. Although recognizing that petitioner had subsequently claimed privilege over six pages from a fourth tranche, the court noted that petitioner had "not raised any arguments about those six pages" in his appeal. *Id.* at 21a n.7. "[A]ny potential future claims," the court explained, "are neither ripe for constitutional adjudication nor capable of supporting [a] preliminary injunction, since courts should not reach out to evaluate a former President's executive privilege claim based on 'future possibilities for constitutional conflict.'" *Id.* at 20a-21a (quoting *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 444-445 (1977) (*GSA*)).

On the "narrower question" before it, Pet. App. 20a, the court of appeals determined that petitioner is unlikely to prevail because "a rare and formidable alignment of factors supports the disclosure of the

documents at issue." *Id.* at 40a. Among those factors were "President Biden's carefully reasoned and cabined determination that a claim of executive privilege is not in the interests of the United States"; "Congress's uniquely vital interest in studying the January 6th attack on itself to formulate remedial legislation and to safeguard its constitutional and legislative operations"; and petitioner's "failure even to allege, let alone demonstrate, any particularized harm that would arise" from granting the Committee access to the "particular documents" as to which he sought a preliminary injunction. *Id.* at 4a-5a.

The court of appeals observed that petitioner's "sole objection" to the release of the records at issue "is that disclosure" of presidential records "would 'burden the presidency generally,' in light of the need for 'candid advice' and the potential for a 'chilling effect.'" Pet. App. 52a (brackets and citation omitted). But the court concluded that this generalized objection "is not close to enough" to justify an injunction overriding the incumbent President's decision. *Id.* at 53a. The court explained that "[w]hen a former and incumbent President disagree about the need to preserve the confidentiality of presidential communications, the incumbent's judgment warrants deference because it is the incumbent who is 'vitally concerned with and in the best position to assess the present and future needs of the Executive Branch.'" *Ibid.* (quoting *GSA*, 433 U.S. at 449).

The court of appeals also emphasized that "when the Executive and Congress together have already determined that [a] 'demonstrated and specific' need for disclosure" exists, "[a] court would be hard-pressed * * * to tell the President that he has miscalculated the interests of the United States, and to start an interbranch

conflict that the President and Congress have averted." Pet. App. 40a (citation omitted). The court found it unnecessary to determine "to what extent" a court could "second guess a sitting President's judgment that invoking privilege is not in the best interests of the United States," because petitioner "decisively" failed to show that such second-guessing was appropriate in light of the confluence of factors supporting disclosure here. *Id.* at 5a & n.2.

The court of appeals determined that the other preliminary-injunction factors supported denial of relief as well. Because petitioner sought a preliminary injunction "solely in his 'official capacity as a former President,'" the court explained, the only irreparable harm that could support relief would be harm "to the present and future interests of the Executive Branch itself." Pet. App. 71a (citations omitted). As to those interests, however, the court deferred to the determination by the incumbent President, who "is 'in the best position to assess the present and future needs of the Executive Branch' and to determine whether disclosure 'impermissibly intrudes into the executive function.'" *Id.* at 72a (citation omitted). The court likewise concluded that the balance of equities and public interest weighed against further delaying release of the documents to the Committee, because "the legislature is proceeding with urgency to prevent violent attacks on the federal government and disruptions to the peaceful transfer of power." *Id.* at 74a.

The court of appeals extended its administrative injunction for 14 days to allow petitioner to file an application for injunctive relief in this Court. Pet. App. 77a n.20. Petitioner filed on the 14th day, and the court of

appeals' administrative injunction will therefore remain in effect until this Court rules on his application.

ARGUMENT

Petitioner renews his contention (Pet. 15-33) that the district court should have enjoined the Executive Branch respondents from disclosing the specific Executive Branch records at issue here to Congress, notwithstanding President Biden's determinations that Congress's inquiry into the events of January 6 serves a compelling legislative need, that an assertion of executive privilege over these records is not warranted, and that disclosing them to Congress would be in the national interest. The court of appeals correctly rejected petitioner's claims, and its decision does not conflict with any decision of this Court or another court of appeals.

Nor does this case otherwise warrant this Court's review. The court of appeals emphasized the narrowness of the issues presented in this appeal, specifically declined to decide many of the broader questions raised by the parties, and grounded its decision in the unique circumstances of this case. Those circumstances include the extraordinary events of January 6; President Biden's considered determination that an assertion of privilege over the documents at issue in this appeal is not warranted; and petitioner's failure to offer any particularized arguments about the need to preserve confidentiality of the documents at issue here. Petitioner's assertions about the implications of the court's decision ignore those case-specific circumstances. The petition for a writ of certiorari should be denied.

A. The Court Of Appeals Correctly Held That Petitioner Is Unlikely To Succeed On The Merits

Petitioner asserts two related challenges to the release of the relevant presidential records to the Committee. He contends that (1) the records are protected by executive privilege (Pet. 22-28), and (2) the Committee lacks authority to request them (Pet. 15-22). Neither contention has merit.

1. The incumbent President's affirmative decision not to assert executive privilege is entitled to substantial deference

President Biden concluded that asserting executive privilege to bar the Committee's access to the records at issue was not "in the best interests of the United States." Pet. App. 12a. The President grounded that conclusion in a careful weighing of Congress's "compelling need in service of its legislative functions" against the Executive Branch's interest in maintaining the confidentiality of the documents at issue. *Id.* at 13a. Petitioner now asks the federal courts to override the sitting President's judgment about the interests of the Nation and the Executive Branch. The court of appeals correctly held that petitioner's invocation of a generalized interest in confidentiality falls far short of justifying that extraordinary step.

a. It is well settled that a sitting President may assert executive privilege to prevent disclosure of sensitive Executive Branch communications. See *United States* v. *Nixon*, 418 U.S. 683, 705-706 (1974) (describing that principle as "too plain to require further discussion" and as having "constitutional underpinnings"). In *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), this Court held that a former President could assert in some circumstances the component of

executive privilege protecting "confidentiality of Presidential communications" that took place during his tenure. *Id.* at 447. *GSA* did not involve a situation where the incumbent President affirmatively determined that an assertion of executive privilege by a former President is unwarranted. But the Court's analysis—and the very nature of executive privilege—indicate that the incumbent President's determination must be controlling, at least absent extraordinary circumstances.

The Court explained that executive privilege, including the presidential communications privilege, "is not for the benefit of the President as an individual, but for the benefit of the Republic." *GSA*, 433 U.S. at 449 (citation omitted). The privilege furthers the Executive's substantial interests in safeguarding the confidentiality of its communications and maintaining the autonomy of the Branch against incursion from coordinate Branches. See *Nixon*, 418 U.S. at 705-706. At the same time, "[e]xecutive privilege is an extraordinary assertion of power 'not to be lightly invoked.'" *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 389 (2004) (citation omitted). The President therefore is vested with the responsibility to weigh the need to protect the confidential communications against the asserted need for the information.

It is the "incumbent President"—not a former President—who is "vitally concerned with and in the best position to assess the present and future needs of the Executive Branch," and thus to evaluate whether an assertion of executive privilege will further or diminish the Executive Branch's interests in any given circumstance. *GSA*, 433 U.S. at 449. "Article II 'makes a single President responsible for the actions of the Executive Branch,'" *Free Enterprise Fund* v. *Public Co.*

Accounting Oversight Bd., 561 U.S. 477, 496-497 (2010) (citation omitted), and allowing a former President to override the decisions of an incumbent President would be an extraordinary intrusion into the latter's ability to discharge his constitutional responsibilities.

Indeed, just as one Congress cannot bind a future one, see *Dorsey* v. *United States*, 567 U.S. 260, 274 (2012), Presidents generally cannot bind their successors, see *Biodiversity Assocs.* v. *Cables*, 357 F.3d 1152, 1172 (10th Cir.), cert. denied, 543 U.S. 817 (2004). A former President cannot veto decisions by his successor to, say, declassify information that he had classified, or unwind a state-secrets assertion he had made. The same should presumptively be true of an incumbent President's determination about whether an assertion of executive privilege would be in the national interest.

That conclusion carries particular force when, as here, the Legislative Branch is requesting the information. In that circumstance, assertion of executive privilege inevitably places the Executive Branch on a "collision course" with a coequal Branch. *Cheney*, 542 U.S. at 389. Even if Congress cannot directly compel production of the information, it has a number of other tools it can deploy, such as withholding appropriations or declining to enact legislation. "Congressional control over appropriations and legislation is an excellent guarantee that the executive will not lightly reject a congressional request for information, for it is well aware that such a rejection increases the chance of getting either no legislation or undesired legislation." *Nixon* v. *Sirica*, 487 F.2d 700, 778 (D.C. Cir. 1973) (en banc) (Wilkey, J., dissenting) (citation omitted).

Managing such sensitive relations between the Branches is the task of the incumbent President, not the

former officeholder. Only the incumbent President may decide whether and how to accommodate congressional information requests as part of "the give-and-take of the political process between the legislative and the executive." *Trump* v. *Mazars USA, LLP*, 140 S. Ct. 2019, 2029 (2020) (citation omitted). Interbranch accommodation is a central component of our constitutional structure that has been the primary means of resolving informational disputes between the political Branches throughout our Nation's history. *Ibid.* A former President has no role in that interbranch process of negotiation and accommodation. And it would be extraordinary to allow a former President to effectively force the Executive Branch into an unwanted confrontation with Congress.

Moreover, this Court has noted the "obvious political checks against an incumbent's abuse of [executive] privilege," *GSA*, 433 U.S. at 448, which help ensure that "constitutional confrontation[s]" engendered by assertions of the privilege occur only when necessary, *Cheney*, 542 U.S. at 389 (citation omitted). Those political checks do not apply to a former officeholder. Similarly, this Court has observed that "to the extent that the privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties, a former President is in less need of it than an incumbent." *GSA*, 433 U.S. at 448 (citations omitted).

Consistent with those principles, this Court has suggested that even when an incumbent President simply fails to support a former President's assertion of executive privilege, it "detracts from the weight" of the assertion. *GSA*, 433 U.S. at 449. All the more so here, where the incumbent President has specifically examined the

matter and made an affirmative determination that granting a request for records is in the best interests of the Nation.

Indeed, separation-of-powers principles dictate that a court should be extraordinarily hesitant to overrule an incumbent President's affirmative determination not to invoke executive privilege. See Pet. App. 40a. When a former President attempts to enlist the judiciary in an effort to override the decision of an incumbent President, a court would be thrust into the "awkward position," *Cheney*, 542 U.S. at 389, of assessing the "wisdom and soundness," *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972), of the incumbent's decision, including a review of the incumbent's estimation of the Executive Branch's near-term and long-term interests. In light of the incumbent President's "constitutional responsibilities and status," his judgment warrants "judicial deference and restraint." *Cheney*, 542 U.S. at 385 (citation omitted). "Article III courts are generally ill-equipped to superintend or second guess the expert judgment of the sitting President about the current needs of the Executive Branch and the best interests of the United States on matters of such gravity and so squarely within the President's Article II discretion." Pet. App. 44a-45a.

b. Petitioner has provided no basis for a court to take the extraordinary step of overriding the President's determination that executive privilege should not be asserted here. President Biden concluded that Congress has a compelling need to understand the circumstances that led to the unprecedented attack on Congress itself that occurred on January 6 and to guard against such attacks in the future. He further determined that that need outweighed the Executive's institutional interests in maintaining the confidentiality of

the relevant records. See Pet. App. 12a-13a. The President emphasized that "the conduct under investigation extends far beyond typical deliberations concerning the proper discharge of the President's constitutional responsibilities," thus in his judgment reducing the Executive's interest in shielding records bearing on that conduct from disclosure to Congress. *Id.* at 13a (citations omitted). And the President found "a sufficient factual predicate for the Select Committee's investigation" into the White House's connection with and response to the events of January 6. *Ibid.* (citations omitted). The President's careful assessment of the Executive Branch's interests in determining whether to allow Congress to obtain access to the specific records at issue in the unique circumstances of its investigation into the extraordinary events of January 6 does not support petitioner's assertion (Pet. 30) that the decision below will "shatter" the "foundations of executive privilege."

To the contrary, as the court of appeals recognized, President Biden's decision not to assert executive privilege "is of a piece with decisions made by other Presidents to waive privilege in times of pressing national need." Pet. App. 45a; see *id.* at 45a-46a (describing decisions not to assert executive privilege by Presidents Nixon, Reagan, George W. Bush, and Trump). Petitioner contends (Pet. 30-31) that those historical practices are inapposite because the sitting Presidents determined not to assert executive privilege "over their *own* records," whereas here President Biden's determination concerns materials that predate his presidency. But executive privilege belongs to, and is asserted on behalf of, the institution of the presidency, not individual Presidents. See *GSA*, 433 U.S. at 449 (observing that executive privilege does not exist "for the benefit

of the President as an individual"). The historical examples demonstrate that Presidents—including petitioner himself—have long recognized that in certain circumstances, assertion of the privilege in response to investigations of unique events of great significance would not serve the institution of the presidency or the Nation more broadly. They have concluded that the prospect of disclosure in such rare instances will not unduly "discourage candid presentation of views by [their] contemporary advisers." *Id.* at 448. So too here.

c. Petitioner contends (Pet. 24-26) that the lower courts erred in affording deference to the judgment of the incumbent President on whether invocation of executive privilege is warranted in a particular instance. He asserts (Pet. 26) that the result is a "subjective standard" that will "unnecessarily result in a further politicized judiciary." But as already discussed, see pp. 15-17, *supra*, the decision whether to invoke executive privilege in response to a congressional request necessarily entails an assessment of the interests of the Executive Branch within the broader context of the congressional investigation and the Executive's ongoing relationship with Congress. It is thus petitioner's position that would risk politicizing the judicial inquiry by inviting courts to override the sitting President's judgment about the best interests of the Executive Branch, and thereby "start an interbranch conflict that the President and Congress have averted." Pet. App. 40a.

Petitioner asserts (Pet. 16) that the decision below "effectively grants Congress plenary power to request (and receive) any information, from any party, at any time," and predicts (Pet. 30) that it will thereby "eviscerat[e]" executive privilege. That prediction lacks foundation. By design, the Executive has the "necessary

constitutional means, and personal motives, to resist encroachments" by Congress to undermine its operations through intrusive investigations. *The Federalist No. 51*, at 349 (James Madison) (Jacob E. Cooke ed., 1961); see *Nixon*, 418 U.S. at 705. "[E]very incumbent President will be the next former President." Pet. App. 54a. And every President has a substantial interest in obtaining "fulsome and frank advice from his advisers," Pet. 23, and thus a strong incentive to protect presidential communications (including those of a previous Administration) from disclosure to Congress in order to avoid chilling advice to the incumbent and to future Presidents. See *GSA*, 433 U.S. at 448.

President Biden has not strayed from protecting those interests. To the contrary, he thus far has made a privilege determination only as to a limited number of responsive records, and has affirmed his intention to consider future questions of privilege on the merits as they arise. Pet. App. 14a; see C.A. App. 158. And as part of the "negotiation and compromise" process for resolving interbranch informational disputes, *Mazars*, 140 S. Ct. at 2031, the Executive Branch has secured the Committee's agreement to defer or withdraw requests for hundreds of pages of responsive records, including 50 pages of records from the tranches at issue here. Pet. App. 16a; see C.A. App. 174; *id.* at 128 ¶ 25; *id.* at 124 ¶ 12; Su Letter 1. Like prior decisions not to assert the privilege by Presidents Nixon, Reagan, Bush, and Trump, see pp. 19-20, *supra*, President Biden's determination that an assertion of privilege is unwarranted as to a discrete set of records requested for an investigation into an unprecedented attack on the Capitol does not suggest that President Biden or his successors will

be unwilling to shield other presidential communications and records in the future.

2. The Committee did not exceed its authority when it requested the relevant records

Petitioner further contends (Pet. 15-22) that the Committee's request for the records is invalid under the Constitution and the PRA, which petitioner suggests "tracks the constitutional rule" governing Congress's power to investigate. Pet. 15. The PRA authorizes a former President to challenge the Archivist's planned disclosure of presidential records only on the ground that it "violates the former President's rights or privileges." 44 U.S.C. 2204(e). Consistent with that limitation, petitioner acknowledged below that he is not bringing a "freestanding challenge" to the validity of the Committee's request; instead "all of his arguments about the statutory and constitutional validity of the Committee request" are "part and parcel" of his assertion of executive privilege over "the specific documents at issue here." Pet. App. 70a n.17. The court of appeals correctly held that those arguments provide no reason to disturb President Biden's conclusion that an assertion of the privilege is unwarranted.

a. This Court has held that Congress's constitutional authorities include an implicit but cabined power to investigate. A congressional request for information "is valid only if it is 'related to, and in furtherance of, a legitimate task of the Congress.'" *Mazars*, 140 S. Ct. at 2031 (quoting *Watkins* v. *United States*, 354 U.S. 178, 187 (1957)). One of those tasks is legislation, and this Court has stated that the authority to investigate "is inherent in the legislative process." *Watkins*, 354 U.S. at 187; see *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 504 (1975) ("[T]he power to investigate is

inherent in the power to make laws."). That investigative authority applies to "subject[s] on which legislation could be had," *Mazars*, 140 S. Ct. at 2031 (citation omitted), and thus includes "inquiries into the administration of existing laws, studies of proposed laws, and 'surveys of defects in our social, economic or political system for the purpose of enabling Congress to remedy them.'" *Ibid.* (quoting *Watkins*, 354 U.S. at 187). And while Congress has no "general power to inquire into private affairs and compel disclosure," and may not seek information for purposes of "law enforcement" or "to try someone before a committee for any crime or wrongdoing," *id.* at 2032 (brackets, citation, and internal quotation marks omitted), a congressional investigation is not invalid simply because it might uncover "crime or wrongdoing," *McGrain* v. *Daugherty*, 273 U.S. 135, 179-180 (1927).

b. The Committee's request for the presidential records at issue here readily satisfies those standards.

The causes of the January 6 attack and the role that government officials may have played in them, or in preparing for or responding to the attack itself, plainly are "subject[s] on which legislation could be had." *Mazars*, 140 S. Ct. at 2031 (citation omitted). Congress might, for example, enact or amend criminal laws to deter violent conduct targeted at the institutions of government. Congress might impose structural reforms on Executive Branch agencies to prevent their abuse to undermine the electoral process. Congress could address intelligence-sharing and resource-allocation by federal agencies charged with detecting and interdicting threats to the security and integrity of our electoral processes. It also could enact legislation designed to enhance the security of the Capitol and Sessions of

Congress. Some of those examples were specifically identified in the resolution establishing the Committee. Resolution 503, § 4(c). And those are just a few examples of potential reforms that Congress could conclude are appropriate as a result of the Committee's work. See Pet. App. 60a.

Petitioner asserts (Pet. 16-17) that the Committee is seeking presidential records solely "to meet political objectives" or for "inquisitorial" purposes. President Biden, however, has determined that the Committee has ample reason to believe that presidential records responsive to its request may contain information relevant to its investigation and potential legislation. Among other things, petitioner spoke at the rally that immediately preceded the attack, stating that the election was "rigged" and "stolen," and urging his supporters to "demand that Congress do the right thing." Pet. App. 6a-7a. Those remarks formed part of the public record on which the investigation is based. *Ibid.* Moreover, according to the Committee's investigation, in the weeks leading up to January 6, petitioner and other White House officials were in regular communication with individuals promoting the January 6 protest. H.R. Rep. No. 152, 117th Cong., 1st Sess. 6 (2021). And a Senate Report alleges that senior government officials were slow to respond to the riot, despite pleas for help from Members of Congress, law enforcement officials, and others. See HSGAC Report 83-95.

The Committee thus has sufficient reason to examine, among other things: (1) what, if anything, petitioner, his advisors, other government officials, and those in close contact with the White House knew about the likelihood of the protest turning violent; (2) when they knew it; (3) what actions they took in response; and

(4) how, if at all, their actions or inactions contributed to or encouraged the events of January 6. Far from "fishing," Pet. 20, or looking to the former President and his advisors as a "case study," Pet. 16, the Committee is investigating events involving petitioner and other White House officials that have an identifiable factual foundation and relate to a specific, unprecedented attack on the Capitol. That investigation unquestionably serves legitimate legislative purposes. And contrary to petitioner's contentions (Pet. 16-17; Supp. Br. 1-3), those legislative purposes are sufficient to support the Committee's request even if some Members also believe that the investigation may "disclose crime or wrongdoing." *McGrain*, 273 U.S. at 180; see *id.* at 151-152.

c. Petitioner's contrary arguments lack merit.

Petitioner contends (Pet. 18) that the Committee's request is too broad. The court of appeals correctly rejected that contention as irrelevant to this appeal, which involves only a discrete set of documents. Pet. App. 63a-64a. As the court emphasized, petitioner "has made no claim" that those documents "are not relevant to the Committee's purpose or that a request capturing those documents is overbroad." *Id.* at 63a.* If future

* The record includes a declaration describing the records at issue in general terms. The first tranche includes White House visitor logs, call logs, and schedule information for or encompassing January 6, 2021, drafts of speeches, remarks, and correspondence, and notes concerning the events of that day. C.A. App. 129. The second tranche includes proposed talking points of a former press secretary concerning the 2020 election, drafts of a presidential speech for the January 6 rally, presidential activity calendars and related notes for January 2021, a note from the former Chief of Staff listing potential or scheduled briefings and telephone calls concerning the January 6 certification and other election-related issues, and a draft executive

tranches of records contain documents that are not "reasonably relevant" to the Committee's legitimate tasks, *McPhaul* v. *United States*, 364 U.S. 372, 381 (1960) (citation omitted), they might be deemed non-responsive on further review and thus never scheduled for production, or the Executive Branch could negotiate with the Committee to withdraw or defer its request—either of which would obviate petitioner's concerns.

Indeed, in consultation with the Executive Branch, the Committee has already agreed to withdraw its request for certain documents that, although technically responsive, would not advance the investigation. See Su Letter. It has also agreed to defer its requests for responsive records that touch particular institutional equities of the Executive Branch. *Ibid.* Those agreements demonstrate that the process of negotiation and accommodation is effectively being used to narrow the Committee's request and to avoid confrontation. See pp. 8-9, *supra*.

Especially against that backdrop, there is no basis for petitioner's suggestion (Pet. 18-19) that the courts should categorically bar the Executive Branch from responding to document requests that are initially framed in broad terms. Instead, to the extent that a former President can challenge the scope of a congressional request under the PRA at all, such a challenge is appropriately evaluated only in the context of the specific

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order on election integrity. *Id.* at 130. The third tranche includes drafts of a proclamation relating to the events of January 6, and memoranda, emails, and other documents concerning the 2020 election. *Id.* at 130-131. Collectively, those records may aid the Committee in understanding the causes of the January 6 attack; what role White House officials may have played in the events that precipitated the attack; and how petitioner and other officials responded to the attack as it occurred and in the days immediately after.

documents that the Executive Branch agrees to produce. If, at the end of that process, petitioner believes that the planned disclosure contains materials that are not reasonably relevant to the Committee's legitimate purposes, the court of appeals stated that he could "attempt to raise an overbreadth challenge then." Pet. App. 63a. But the mere possibility that such a dispute could arise with respect to future documents provides no basis for enjoining production of the documents at issue in this appeal.

Petitioner likewise misses the mark when he contends (Pet. 18-19) that the Committee should have sought information from other sources before invoking the PRA. As explained above, pp. 24-25, *supra*, under the particular circumstances presented, the Committee had reasonable grounds for concluding that these presidential records contain otherwise unavailable information relevant to the causes of and responses to the events of January 6. Petitioner does not identify any other sources from which the same information contained in the records at issue here could have been obtained. And even if future tranches of records were relevant to this appeal, the Committee has already demonstrated that it is willing to exhaust efforts to obtain information elsewhere before pressing its request for presidential records bearing on the same information. See Su Letter 1-2.

Petitioner also relies (Pet. 19-22) on this Court's decision in *Mazars*, *supra*. That reliance is misplaced. *Mazars* involved the validity of a committee's attempt to use its inherent powers to issue compulsory process for personal information about a sitting President. 140 S. Ct. at 2035-2036. This Court concluded that more careful scrutiny was warranted given the "ongoing

institutional relationship" between Congress and the Executive Branch and the possibility that Congress might deploy its subpoena power to "'exert an imperious controul' over the Executive Branch" and "aggrandize itself at the President's expense." *Id.* at 2033-2034 (citation omitted). The Court emphasized the need to protect the "established practice" of accommodation and negotiation between the political Branches. *Id.* at 2034 (citation omitted). The Court further observed that a congressional request for a President's personal papers raises "a heightened risk" that Congress is acting with an improper motive, given the "documents' personal nature and their less evident connection to a legislative task." *Id.* at 2035.

The separation-of-powers considerations underlying *Mazars* are absent where, as here, a congressional committee requests official records belonging to the United States and the incumbent President determines that it is in the best interests of the Nation to be responsive to that request. See Pet. App. 57a-60a. In such circumstances, the incumbent President necessarily has determined that providing the Committee with access to the information will not unduly impair the Executive Branch in carrying out its constitutional responsibilities. In fact, it is an injunction barring disclosure in the face of such a presidential determination that would interfere with the "ongoing institutional relationship" between the Branches by disrupting the "established" process of negotiation and accommodation that *Mazars* sought to protect. See *Mazars*, 140 S. Ct. at 2033-2035. And because the Committee seeks access only to official records over which the sitting President has determined that executive privilege should not be asserted, not the personal papers of a sitting President, there is no

"heightened risk" that Congress is seeking the materials for the improper purpose of obtaining "'imperious controul' over the Executive Branch." *Id.* at 2034-2035.

In any event, the court of appeals correctly held that the Committee's request accords with the considerations identified in *Mazars*. Pet. App. 60a-63a. The Court in *Mazars* identified four nonexclusive "special considerations," none of which would preclude making the requested documents available to the Committee.

First, "courts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers," including by determining whether "other sources could reasonably provide Congress the information it needs." *Mazars*, 140 S. Ct. at 2035-2036. Here, the Committee has established its need for information from the White House as part of the Committee's inquiry into the causes of the January 6 attack, any connections to government officials, and the response once violence broke out at the Capitol. See pp. 24-25, *supra*. Petitioner has not identified any alternative source of information that could substitute for the specific documents at issue here. Nor, more generally, has petitioner identified alternative sources that could inform the Committee about what, if anything, the former President, his advisors, and other White House officials contributed to or knew about the events leading up to January 6 ,and what actions they took or declined to take in preparation for or in response to the January 6 rally and subsequent riot. See Pet. App. 62a-63a.

Second, "courts should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective." *Mazars*, 140 S. Ct. at 2036. As explained above, the documents at issue here

are within the scope of the Committee's legitimate inquiry. That is especially so given the sitting President's judgment that an assertion of executive privilege over these documents is not warranted. The Committee's request more generally is subject to further narrowing through the process of negotiation and accommodation contemplated by the Constitution and the PRA, and petitioner is not prevented from asserting executive privilege over other documents in the future.

Third, courts should "be attentive to the nature of the evidence offered by Congress": "The more detailed and substantial the evidence of Congress's legislative purpose, the better." *Mazars*, 140 S. Ct. at 2036. Resolution 503 identifies the Committee's task of "investigat[ing] and report[ing] upon the facts, circumstances, and causes" of the January 6 riot, § 3(1), including the federal government's actions in "detecting, preventing, preparing for, and responding" to the riot, § 4(a)(2)(B). It directs the Committee to issue a report containing "recommendations for corrective measures," which include "changes in law" to "prevent future acts of violence * * * targeted at American democratic institutions," to "improve the security posture of the United States Capitol Complex," and to "strengthen the security and resilience of * * * American democratic institutions against violence, domestic terrorism, and domestic violent extremism." § 4(a)(3) and (c). And as noted, the facts in the public domain and developed by the Committee to date are sufficient to warrant a further inquiry into any connections between the actions of the White House and the events of January 6, and to explain why the Committee believes the requested records will advance those legislative goals.

Fourth, courts should "carefully scrutinize[]" any "burdens on the President's time and attention." *Mazars*, 140 S. Ct. at 2036. But petitioner is no longer the sitting President. See *GSA*, 433 U.S. at 448. Moreover, the applicable regulations permit the Archivist to "adjust any time period or deadline" as needed, 36 C.F.R. 1270.44(g), and the Archivist has exercised that authority to provide sufficient time to review the documents in question. Pet. App. 65a-66a; see C.A. App. 127 ¶ 23. Petitioner identifies no reason to believe similarly reasonable adjustments would not be made in the future should they become necessary.

B. The Court Of Appeals' Decision Does Not Warrant Further Review

Petitioner implicitly acknowledges (Pet. 14-15) that the decision below does not conflict with the decision of any other court of appeals, but contends that review of this "'one-of-a-kind'" case is nevertheless warranted because of the "weighty issues" involved. Pet. 15 (quoting *Clinton* v. *Jones*, 520 U.S. 681, 689 (1997)). That contention is incorrect.

Petitioner's assertions about the importance of this case rest on his prediction (Pet. 13) that "[t]he frankness of [presidential advisors'] advice will necessarily be chilled" by the decision below, which he claims (Pet. 16) "effectively grants Congress plenary power to request (and receive) any information, from any party, at any time." But as already discussed, that prediction is unsound. The court of appeals emphasized the narrowness of its decision, which was grounded in the "rare and formidable alignment of factors [that] supports the disclosure of the documents at issue." Pet. App. 40a. Indeed, although the potential for disputes between a former President and the incumbent President is inherent

in the structure of the PRA, see 44 U.S.C. 2204(e), such a dispute has never before arisen in the more than four decades since the Act was passed in 1978. President Biden's affirmative determination that an assertion of executive privilege over the documents at issue is unwarranted in the extraordinary circumstances presented here is not likely to have any materially greater effect on the future candor of presidential advisors than have prior presidential decisions not to assert executive privilege in connection with events like Watergate, Iran-Contra, and September 11. See pp. 19-20, *supra*.

Petitioner's slippery-slope argument is further undermined by the limited scope of this appeal. As the court of appeals emphasized (Pet. App. 20a-21a), this appeal concerns only three specific sets of records and the particular arguments that petitioner has—or has not—made with respect to their disclosure. That narrow focus would make this an unsuitable vehicle for addressing many of the "novel and important questions" that petitioner urges the Court to resolve. Pet. 12 (emphasis omitted). For example, petitioner has not even *attempted* in this case to offer particularized arguments, drawn from his "expert viewpoint as the President during whose term" certain documents were created, about why the incumbent President may have erred in assessing the importance of confidentiality for the specific documents at issue. Pet. App. 57a. Nor has petitioner made "even a preliminary showing that the content of any particular document lacks relevance to the Committee's investigation." *Id.* at 52a. And the court of appeals likewise recognized that petitioner had forfeited other arguments a former President might conceivably raise about the appropriateness of

deference to the views of the incumbent President. See *id.* at 68a-70a.

Those omissions and forfeitures, and the extraordinary facts supporting the lower courts' rulings declining to overturn the President's determination that the Committee should have access to the specified documents in the first three tranches, make this a poor case in which to decide whether it could ever be appropriate for a court to "second guess a sitting President's judgment that invoking privilege is not in the best interests of the United States." Pet. App. 5a n.2. Those circumstances would likewise make this case a poor vehicle for deciding any of the other "weighty issues" (Pet. 15) that petitioner seeks to raise. Indeed, the court of appeals specifically declined to resolve many of the very issues petitioner identifies (Pet. 13), explaining that petitioner could not prevail under "any of the tests" that he himself had advocated. Pet. App. 40a; see *id.* at 60a (same).

* * * * *

For the foregoing reasons, this Court should deny the petition. But if the Court grants review, it should expedite its consideration of this case on the merits. President Biden has recognized Congress's "compelling need" to access the documents in question "in service of its legislative functions." Pet. App. 13a. And in light of "the urgency of the Select Committee's need for the information," he has directed the Archivist to provide those Executive Branch materials to the Committee expeditiously. *Id.* at 14a. The courts below likewise considered petitioner's request for a preliminary injunction on a highly expedited basis, and subsequently determined that the judiciary should not further delay the Executive Branch from producing records that might assist "the legislature i[n] proceeding with urgency to

prevent violent attacks on the federal government and disruptions to the peaceful transfer of power." Pet. App. 74a; see *id.* at 124a-125a.

This Court should likewise expedite any further proceedings in this case. The Committee has informed us that it is requesting that if the Court grants the petition for a writ of certiorari, it schedule oral argument as early as February. The government is prepared to brief and argue the case on that schedule, or on any other expedited schedule set by the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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